Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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80-2146

NO.

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1980

THE STATE OF FLORIDA,

Petitioner,

vs.

MARK ROYER,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Florida

BRIEF OF PETITIONER ON JURISDICTION

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QUESTION PRESENTED

WHETHER THE DECISION OF THE FLORIDA COURTS, CONSTRUING THE FOURTH AMENDMENT AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, HOLDING: 1) THAT THE MERE APPROACH AND CONVERSATION OF A POLICE OFFICER IS A DETENTION/STOP; 2) THAT THE FACTS HEREIN CONSTITUTE A STOP AND ARREST (3) THAT ALL SO-CALLED "PROFILE TRANSACTIONS ARE ILLEGAL NO MATTER WHAT THE FACTS ARE, UNDER REID V. GEORGIA, ___ U.S. ___, 100 S.CT. 2752 (1980) AND 4) THAT THE CONSENT AND SEARCH HEREIN WAS THEREFORE ILLEGAL, IS IN DIRECT AND SUBSTANTIAL CONFLICT WITH THE RULE OF THIS COURT IN UNITED STATES V. MENDENHALL, ___ U.S. ___, 100 S.CT. 1870 (1980); SCHNECKLOTH V. BUSTAMONTE, 412 U.S. 218 (1973) AND TERRY V. OHIO, 392 U.S. 1 (1968) AND IS A MISAPPLICATION OF THE FOURTH AMENDMENT?

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PREFACE

The Petitioner, THE STATE OF FLORIDA, was the Petitioner in the Supreme Court of Florida, the Appellee in the District Court of Appeal of Florida, Third District, and prosecution in the Florida trial court. The Respondent, Mark Royer, was the Respondent in the Supreme Court of Florida, the Appellant in the District Court and the Defendant in the trial court. In this brief, the parties will be referred to as they appeared in the Florida trial court below.

The following references is made in this brief:

(A) For the portions of the record below sufficient to show jurisdiction in this court, which are contained in the Petitioner's Appendix and consist of pages A1-A10.

I.

OPINIONS BELOW

The opinion of the District Court of Florida, Third District, en banc, reversing the Florida trial court's denial of the Defendant's Motion to Suppress and reversing the Florida District Court panel opinion reported therin, is reported at Royer v. State, 389 So.2d 1007 (Fla. 3d DCA 1980). The opinion of the Florida Supreme Court denying the State's Application for review (Adkins and Alderman, JJ. dissenting), is contained in the Petitioner's Appendix at "A1" and will be reported by the West Publishing Company. There is no official reporter for citation to this opinion.

II.

JURISDICTION

On March 19, 1981, the Supreme Court of Florida with two Justices dissenting denied the State's timely application for review. A1. On May 19, 1981, this Honorable Court (by Justice Powell) extended the time for filing the present petition up to and including June 16, 1981. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, §1257(3) and Amendments IV and XIV of the United States Constitution.

The interpretation of the Florida Constitution and the United States Constitution are identical for purposes of the application of the criminal law and search and seizure issues. Hetland v. State, 366 So.2d 831 (Fla. 2d DCA 1979) approved and adopted, Hetland v. State, 387 So.2d 963 (Fla. 1980). The constitutional issues

herein were presented and fully argued at all levels of the proceedings below. See, A2-A3 (Motion to Suppress); Royer v. State, 389 So.2d 1007 (Fla. 3d DCA 1980).

III.

CONSTITUTION AND STATUTORY PROVISIONS

Amendment IV of the Constitution of the United States provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV of the Constitution of the United States provided that:

> "All persons born naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce andy law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

IV.

STATEMENT OF THE CASE

The Respondent, MARK ROYER, was charged by information with unlawful possession of marijuana and possession of marijuana with intent to sell, arising out of his attempt to transport six-five (65) pounds of marijuana in his luggage through the Miami International Airport on January 3, 1978. 389 So.2d 1008. The Respondent filed a Motion to Suppress the marijuana, which the trial court denied after a hearing. The trial court denied the Respondent's Motion to Suppress upon two alternative grounds: 1) that the Respondent freely and voluntarily consented to the search of his baggage and 2) that the officers, based upon the facts they observed, which corresponded with their experience, had probable cause to believe that the Respondent was transporting narcotics. Id, at n1.

The Florida District Court panel opinion, which was reversed by the present en banc opinion, sets out the facts determined by the trial court, without the factual inferences and editorial remarks of the en banc main court opinion herein:

> "The facts leading up to the search and seizure of the marijuana were the following. Officers Johnson and Magdalena, of the Dade County Public Safety Department, were plainclothes detectives assigned to the County's Crime Bureau, Narcotics Investigation Section, performing duty at Miami International Airport as members of what was known as the Smuggling Detail, consisting of a sergeant and eight officers, who worked in pairs, on shifts. Said officers had acquired knowledge of a "profile" by which it was possible with a substantial measure of certainty to recognize couriers or carriers of drugs in air travel. Such profile had been arrived at by experiences of narcotics officers with a great number of such persons in main drug distribution centers and the target city destination places.
>
> Miami was a known point from which imported drugs,[1] including marijuana, were transported to other target destination cities, one of which was New York City. It was

> known that commercial airlines were used for such transport of drugs by such couriers and others. On a certain day, at the Miami International Airport, the above-named officers observed the defendant as he was about to purchase a ticket on an airline. The defendan's appearance and mannerisms, his luggage and the way he dealt with it, and his means of obtaining his ticket, etc., as observed by the officers were such as to fit the profile, the details and nature of which we purposely do not here state. As disclosed through the testimony of Officer Johnson, the defendant was observed to fit the profile of a drug courier.
>
> The defendant checked his two suitcases, placing identification labels thereon bearing the name "Holt", but without stating his address or telephone number in the spaces provided therefor on the labels. The officers noted the name which the defendant placed on the suitcases."

At this point the Petitioner would note that the en banc Court opinion herein totally discounts the alias used by the Respondent as not significant. 389 So.2d at 1019. However, Detective Johnson, was accepted by the trial court as an experienced airport courier/narcotics officer, testified

that cash only and the lack of identification is central to the couriers efforts to avoid detection and to avoid detection by travelling under an alias. A8. Detective Johnson testified that the failure of a passenger to properly identify himself and his luggage is a violation of the airline regulations governing air travel. A10. He also, testified that he maintains constant contact with police departments in major cities and the Federal Drug Enforcement Administration concerning drug couriers and their activity. Johnson said that he has worked with the Los Angeles and Detroit DEA units and in particular Paul Marconi in developing Miami's profile.

Further, while inserting its view of

1. Even this Court has taken judicial notice of the notoriety of Miami as a illicit drug terminal in United States v. Mendenhall, ___ U.S. ___, 100 S.Ct. 1870 at 1881 (Powell, Burger and Blackmun, JJ. concurring).

the facts, the District Court en banc opinion ridiculed Detective Johnson's actual experience and actual observations of the Respondent as "amateur psychiatry" to be, "totally disregarded." 389 So2d at 1016 n.4. Johnson testified without objection that in the Detectives' training and experience the Appellant's appearance and demeanor attracted his attention and the attention of Detective Magdelena. The Respondent was extremely nervous uneasy, pale and appeared to be looking about to see if anyone was watching him. A4-A8. Detective Johnson testified that in his experience of observing passengers eight (8) hours a day and thousands over a period of six months, that the Respondent's agitation was clearly centered on being detected rather than that he was just a "white knuckle" flyer. A4-A8.

The District Court panel opinion,

which was reversed, describes the transaction between the officers and the Respondent:

> "As the defendant was proceeding to enter the concourse leading to the boarding area, after having obtained his ticket and checked his suitcases, the officers approached him, identified themselves as police officer, and asked him if he had time to talk with them, which he said he did. There followed a series of requests by the officers, to none of which the defendant objected, and to each of which the defendant assented. Those consisted of his initial consent to talk to the officers, his production upon request of his ticket (which was to New York City), and his driver's license for indentification (which showed his name to be Mark Royer, not Holt which was the name on the ticket); his consent to move with them out of the main room into a vacant side room for further conversation; his consent to the officer's request that the suitcases be opened (after Johnson had retrieved the suitcases): When the officer's requested his consent to the opening of the suitcases, the defendant produced a key from his pocket and unlocked one of the cases. He explained that he did not know the combination of the combination lock on the other suitcase, and upon request gave his consent to the opening of the other case by the officers, which they did with the aid of a screwdriver. The search revealed the suitcases contained 65 pounds of marijuana. The testimony given by Officer Johnson, which

the court chose to believe, was sufficient to establish, as fact, the consent of the defendant to the several requests of the officers. In his testimony the defendant did not state that he had objected to, or that he had not consented to any of such requests of the officers.

"The defendant testified that during the time he was in the presence of the officers he was not told that he was free to leave; and as to each of the steps or requests to which the defendant consented, he testified (1) he was not told that he did not have to consent, and (2) as to each of such consents, when asked by his lawyer why he consented, he gave the same answer, Viz., "they were police officers and I thought I had to."

"On appeal the defendant does not argue that the court committed error by finding, on the totality of the evidence, that he did so consent, but contends the court's finding of consent was error because he was not told he could refuse consent AND THAT BECAUSE SUCH CONSENTS WERE GIVEN TO POLICE OFFICERS AS A MATTER OF LAW IT COULD NOT BE HELD THAT HIS CONSENTS WERE FREE AND VOLUNTARY. We reject those contentions as being without merit in this case.

"[Footnote]: The testimony of Officer Johnson and of the defendant conflicted on only one item.

> Johnson testified that when he asked the defendant for permission to open the suticases the defendant produced a key from one of his pockets and used it to unlock the one case. The defendant testified that previously the officers had had him empty his pockets, and that he had obtained the key with which he opened one of the cases from the top of a desk upon which the contents of his pockets had been placed by him. In rebuttal thereto, Johnson testified again that the defendant took the key from his pocket to open the case, and testified that the defendant had not been requested to empty his pockets until after he was arrested, after the suitcases had been opened." [Emphasis added].

389 So.2d at 1008-1009.

Upon the foregoing facts the District Court panel opinion herein held, 1) that there is no requirement in the law that the Respondent be advised of his right to refuse consent; 2) that voluntary conversation with police officers is without constitutional impact; 3) that in the totality of the circumstances the trial court could have found voluntary consent; 4) that Taylor v. State, 355 So.2d 180 (Fla. 3d DCA 1978), is distinguishable because in that circumstance,

the officers had overtly coerced the consent by beginning the smae search that they were requesting; 5) submitted that its holding is inconsistent with Frost; 6) citing inter alia, Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L.Ed. 2d 543 (1966) and United States v. Chadwick, 433 U.S.1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), held that an arrest and detention of the Respondent was proper, where in the Detective's experience and observations he was a drug courier and 7) that the trial court's alternative holding that a warrantless search of the Respondent's luggage under the exigency exception to a warrantless search of the Respondent's luggage under the exigency exception to the warrant requirement was factually supported by the record and lawfully correct. See, 389 So.2d at 1009-1015.

A petition for rehearing en banc was requested by the dissent upon a petition by the Respondent. Id at 1015. The petition

was granted; extensive briefs of the parties were submitted and oral argument was subsequently heard on April 14, 1980. On September 9, 1980, in a split opinion, the District Court reversed the panel opinion and the trial court.

The en banc decision herein is identical in its structure to the dissent to the panel opinion and is authored by the dissent to the panel opinion. Indeed, the facts relied upon by the en banc court are no different than those stated above. except that the en banc court infers (on a defense appeal) from the barren record that the Defendant's ticket and license were not returned. Id at 1018. Such a factual finding and question was never presented to the trial court. This also of course, also ignores any issue of articulable suspicion to conduct a brief investigation. The fundamental position of the en banc court was simply a reweighing and different view of the facts.

The fundamental error in the en banc court reversal herein is reflected in its view of the factual question of consent found by the trial court and affirmed by the panel opinion. The en banc court opinion refers to the factual finding of consent by the trial court as THE "ALLEGED CONSENT." Id at 1019. Citing Frost, infra, the District Court en banc opinion then takes the view that any movement from the airport concourse to the room forty (40) feet away under Dunaway was an arrest. Id 1018-1019. The Court ignores any possibility of a brief detention of the Respondent for investigation by stating that the alias used by the Defendant was not a suspicious circumstance in the experience of the Court[2]. 389 So.2d at

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2. The District Court's en banc decision and outright rejection of Johnson's experience and factual observations is absolutely refuted by the record. THE DEFENDANT WAS NERVOUS ABOUT SIXTY-FIVE (65) POUNDS OF MARIJUANA!! He was travelling under an alias to avoid detection!

1019 n. 11. The Court says the State conceded at oral argument that the detectives would not have let the Respondent leave the room. Id. at 1018. After ten (10) minutes of discussion with the undersigned, the undersigned stated at oral argument only: 1) that neither the undersigned nor the Court was at the scene and therefore should not speculate as to whether the Respondent would have left before any further proceedings and 2) that assuming that the circumstances amounted to articulable suspicion, the detectives would not have let the Respondent go had he refused consent.[3]

The en banc court then takes the position that Reid v. Georgia, ___U.S.___, 100 S.Ct. 2752 (1980) precludes all stops based upon all profiles and states further that

---

[3] Certainly with articulable suspicion the Detectives could have obtained a narcotics dog or engage in some other sort of investigation. See, Harpold v. State, 384 So.2d 279 (Fla. 3d DCA 1980); Sizemore v. State, 390 So.2d 401 (Fla. 3d DCA 1980).

United States v. Mendenhall, __U.S.___, 100 S.Ct. 1870 (1980) is contra. 389 So. 2d 1019 and 1017 n. 6. The Court concluded without viewing the facts reached by the trial court as sustained by the panel, that because the Respondent was illegally detained, his consent was therefore, automatically invalid. Id at 1018. The Court stated that there was no precedent to sustain the trial court. But see, e.g., United States v. Mendenhall, supra. On September 24, 1980, the State filed its Motion for Rehearing and Motion for Certification noting the grevious error in the en banc decision. On October 21, 1980, the State's Motion for Rehearing was denied. On March 18, 1981, the Florida Supreme Court with Justices Alderman and Adkins dissenting, denied the State's application for review of the Florida District Court's en banc decision. Al.

V

SUMMARY OF ARGUMENT

The decision of the Florida District Court, construing the Fourth Amendment of the United States Constitution holding: 1) that the mere approach and conversation of a police officer is a detention/stop and arrest; 2) that the facts herein constitute a stop and arrest 3) that all so-called "profile" transactions are illegal no matter what the observed facts are under Reid v. Georgia, ___ U.S. ___, 100 S.Ct. 2752 (1980) and 4) that the consent and search herein were therefore illegal, is in direct and substantial conflict with the rule of this court in United States v. Mendenhall, ___U.S. ___, 100 S.Ct. 1870(1980); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) and Terry v. Ohio, 392 U.S. 1 (1968). In view of this Court's recent decision in Mendenhall and Reid v. Georgia, ___U.S. ___, 100 S.Ct. 2752 (1980) leaving the present issues in a state

of some confusion, this Honorable Court should correct this patent misconstruction of the United States Constitution. The exclusionary rule should not be applied in the circumstances of the case at bar, where the officers acted in good faith and the application of the exclusionary rule serves no purpose except to frustrate the lawful interdiction of chronic narcotics traffic. See, United States v. Williams, 622 F.2d 80 (5th Cir. 1980), en banc.

V

ARGUMENT

The decision of the Florida Courts cannot be reconciled with the decisions of this Court in United States v. Mendenhall, __U.S.__, 100 S.Ct. 1870 (1980); Terry v. Ohio, 392 U.S. 1 (1978); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); and Adams v. Williams, 407 U.S. 143 (1972). In Royer the Florida Third District Court of Appeal has

rejected the mandate of Terry, Mendenhall, Schneckloth, Brown, Draper, and Adams v. Williams, in the airport context, in favor of what it erroneously perceives as the ruling of this Court in Reid v. Georgia, ___U.S.__,100 S.Ct. 2752 (1980). The District Court gives force of law a previous "attraction" to the concept that any approach by the police officer is a "stop." See, State v. Frost, 374 So.2d at 597-598 (Fla. 3d DCA 1979);Royer, 389 So.2d at 1019. Under the guise of Royer and Reid the Florida Third District Court of Appeals has embarked upon a course(in addition to that in the case at bar), of wholesale reversals of Florida trial court findings of consent and articulable suspicion in the airport context. See, Correa v. State, 389 So.2d 1204 (Fla. 3d DCA 1980)(reversed upon rehearing subsequent to Royer assuming that the mere approach of a police officer is a "show of authority"); Stuart v. State, 389 So.2d 4 (Fla. 3d DCA 1980)(reversed see Royer and Frost); Major v.

State, 389 So.2d 1203 (Fla. 3d DCA 1980) (Schwartz, J.)(reversed on rehearing after Royer even though the Defendant signed a written consent form and was advised of a right to refuse consent ; Monohan v. State, 390 So.2d 756 (Fla. 3d DCA 1980)(assuming after Royer that the approach of narcotics officers in a airport is a "stop" per se); Cimino v. State, 390 So.2d 795 (Fla. 3d DCA 1980)('reversed see Reid and Royer). The State has brought four separate petitions before this Court, in Florida v. Rodriguez; U.S.Sup.Ct.Case No. 80-1158; Florida v. Stuart, U.S.Sup.Ct.Case No. 80-1319; Florida v. Harrison, U.S.Sup.Ct.Case No. 80-1449 and the present case, which each demonstrate the misapplication of Reid and Mendenhall and the failure of the Florida District Court to properly apply the prohibitions of the Fourth Amendment. As in the case at bar, the Florida Third District controls the substantive law in airport cases, located as it is, in Miami, Florida.

In Reid, this Court did not reverse the Georgia appellate court, but rather remanded for further consideration. Indeed upon remand, the Georgia appellate court reaffirmed its alternative view reported at State v. Reid, 149 GA.App.685, 255 S.E.2d 71 (1979), that the transaction therein was indeed a consensual transaction. State v. Reid, ___Ga.App.___, 29 Crim.L.Rep. 2133 (1981) [on remand from 448 U.S. 151 (1980)]. The undersigned has argued and anticipated the foregoing result in Reid to no avail in the Florida District Court.

The Petitioner submits that Mendenhall and Reid are entirely consistent with each other and contrary to the District Court's opinion herein. The District Court's opinion has overlooked the fact that the panel in this case properly refused to substitute its judgment for that of the trial court where the evidence clearly supports a finding of free and voluntary consent. See, United States v. Mendenhall. Contrary to the District Court's

opinion, the Mendenhall Court opinion rejects identical movement to that herein, as neither an arrest nor a detention and rejects mere "silent acquiescence" as a per se rule invalidating consent. In the opinion of the court, the Mendenhall court recites preliminary facts identical to those herein as not tantamount to a seizure:

> "On the facts of this case, no 'seizure' of the respondent occurred. [1] The events took place concourse. [2] The agents wore no uniforms and displayed no weapons. [3] They did not summon the respondent to their presence, [4] but instead approached her and identified themselves as federal agents. [5] They requested, but did not demand to see the respondent's identification and ticket. Such conduct without more, did not amount to an intrusion upon any constitutionally protected interest. The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official."
>
> 100 S.Ct. at 1877.

The Court's opinion in Mendenhall is

consistent with every respect with Reid (see, Justices Powell, Burger and Blackmun concurring in Reid) and is consistent in every respect with the arguments made by the State time after time before the District Court which have been rejected by the District Court under the guise of Royer and this Court's opinion in Reid.

In the case at bar, as in Mendenhall, the events herein 1) took place upon a public concourse; 2) the officers wore no uniforms and displayed no weapons; 3) the officers did not summon the defendant 4) but instead the officers approached him and identified themselves 5) requested but did not demand the Defendant's identification and ticket and 6) the officer's posed a few questions, the primary of which was the false identication the Defendant had given (the same circumstances as in Mendenhall). In reciting Dunaway v. New York, __U.S.__, 99 S.Ct. 2248 (1979), as supportive of the 'movement-is-a-

detention/arrest' proposition, the District Court has overlooked the fact that Dunaway is bottomed upon its facts as stated by the Court, thus: "There can be little doubt that petitioner was 'seized' in the Fourth Amendment sense when he was TAKEN INVOLUNTARILY to the police station." [Emphasis added]. 99 S.Ct. at 2253. The District Court has overlooked the fact that as in Mendenhall the Defendant was only asked if he would accompany the officers. That the Defendant silently accompanied the officers, is without constitutional impact under Mendenhall. 100 S.Ct. at 1878-1879.

As in Mendenhall in the case at bar, the District Court has once again inserted its judgment for that of the trial court upon a question of fact. The question of whether consent was voluntarily given is a question of fact to be determined in light of all the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Recently, in Edwards v. Arizona, ___U.S.____,

29 Crim.L.Rep. 3037 (1981), this Court explained the holding in Schneckloth, thus:

> "The issue in Schneckloth was under what conditions an individual could be found to have consented to a search and thereby waived his Fourth Amendment rights. The Court declined to impose the "intentional relinquishment or abandonment of a known right or privilege" standard and required only that the consent be voluntary under the totality of the circumstances." [Emphasis added]

The District Court under the guise of the Fourth Amendment, has in sum, applied the extraordinary standards of review of consent, which was rejected in Schneckloth, to defeat any State prosecution based upon consent. As reflected in Edwards this is a patently erroneous standard of review under the Fourth Amendment.

The State of Florida in the case at bar and in the decisions above and those that it has brought to this Court, is, faced with a judicial impasse in the Third District Court of Appeal, the seat of the nation's most chronic drug traffic. It is plainly evident that contrary to Terry v. Ohio; Schneckloth

v. Bustamonte and United States v. Mendenhall, the Florida District Court has departed from any correct constitutional analysis under the guise of this court's views in Reid v. Georgia,

To deny that these officers had reasonable belief that it was more likely than not, that the Defendant was transporting narcotics upon the facts known to them in the case at bar, is to deny the validity of their extensive training and experience. The officers simply responded in good faith to the obvious circumstances, which they observed as trained narcotics investigators. The officers also responded in good faith to the overt manifestations of consent of the Defendant. The application of the exclusionary rule to the good faith actions of these officers is nonsensical and contrary to any intended purpose under the United States Constitution. See, United States v. Williams, supra; see also, Stone v. Powell, 428 U.S.465, 496-516(1976)(Burger J.concurring).

VII

CONCLUSION

The Petitioner submits that there is

substantial federal question herein in the airport context regarding the construction of this Court's opinions in Dunaway, Mendenhall, Reid Terry, Adams and Schneckloth. The utter confusion in the opinion in Royer as to this Court's opinions in Reid and Mendenhall, is causing substantial disruption and confusion in the State's prosecution efforts in Florida, the Nation's most chronic drug courier terminal. Illicit narcotics traffic is an insidious cancer eating at the very fabric of our society. Narcotics traffic presents a clear and present danger to the underlying fabric of this nation. The "serbonian bog" of the exclusionary rule should not be extended to the present circumstances. Cf., complaint, in, United States v. Andrews, 474 F.Supp. 456 at 462 (D.Colo. 1979). This Court has jurisdiction and should take jurisdiction over this matter of compelling national importance.

JIM SMITH, Attorney General

CALVIN L. FOX, Esquire
Assistant Attorney General

SUPREME COURT OF FLORIDA
WEDNESDAY, MARCH 18, 1981

STATE OF FLORIDA, Petitioner,	:	
vs.	:	CASE NO. 59,953
MARK ROYER,	:	District Court of Appeal 3rd District
Respondent.	:	Case No. 78-1050
	:	

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is hereby denied.

No Motion for Rehearing will be entertained by the Court. See Fla.R.App.P. 9.330(d).

SUNDBERG, C.J., BOYD, OVERTON, ENGLAND and McDONALD, JJ., Concur
ADKINS and ALDERMAN, JJ., Dissent

A True Copy
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Hon. Ellen M. Gable,Judge
Sid J. White, Calvin L.Fox,Esquire
Clerk Supreme Theodore Klein,Esquire
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IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 78-200

THE STATE OF FLORIDA)
PLAINTIFF,)
vs.)MOTION TO SUPPRESS
MARK ROYER,)
Defendant.)
)

Defendant, MARK ROYER, by and through his undersigned counsel, hereby files this his Motion to Suppress all physical evidence in this case, including one white suitcase, one grey suitcase, the contents of both suitcases, including a substance alleged to be marijuana and currency of the United States on the following grounds:

1. The property was illegally seized without a warrant.

2. The facts on which the motion is based are as follows:

a. The Defendant was observed in an airport ticket line by two police officers.

b. The officers were narcotics officers patroling the airport looking for people they thought might be carrying narcotics.

c. The Defendant, by reason of the fact that he placed his suitcases near the front of the ticket line, that he appeared somewhat nervous and that he paid cash for his

ticket, made the officers suspicious that he might be a person involved in narcotics.

d. That Defendant purchased his ticket and began to move towards the concourse to board his flight.

e. The Defendant, while engaged in lawful conduct, was stopped by the two officers who identified themselves as police officers and asked the Defendant to accompany them to a lounge area away from the main stream of airport traffic for questioning.

f. The Defendant was further detained and questioned which concluded in the officers searching the Defendant's suitcases.

g. The officers claim that they asked for and received consent to search Defendant's suitcases.

h. The alleged consent was obtained after the officers informed the Defendant that they suspected he was transporting narcotics and after he had been detained for a considerable period of time.

i. One of the officers admitted on deposition that he did not have probable cause to believe the Defendant was transporting narcotics.

j. The Defendant was not advised that he did not have to answer the questions,that he could refuse to give his consent to the search.

3. The search of the Defendant's suitcases was conducted in violation of the Fourth Amendment to the Constitution of the United States, the Fourteenth Amendment to the Constitution of the United States and Article I, Section 12 of the Florida Constitution. The search was conducted without a warrant. The exception to the warrant requirement relied on by the State in the instant case is consent. It is clear,however, that the Defendant did not voluntarily consent to the search and that his purported consent was a mere acquiescence to the authority of the officers caused by the illegal detention of the Defendant.

FINE JACOBSON BLOCK GOLDBERT
& SEMET, P.A.
Attorneys for Defendant
2401 Douglas Road
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IRWIN J. BLOCK, ESQ.

[EXCERPT OF TESTIMONY]

Q. Had you received any prior information regarding Mr. Royer at that time?

A. No, sir.

Q. And what, if anything, drew your attention to him?

A. The two suitcases, one was white in color and appeared used, and the other was a silver gray suitcase which appeared to be brand new. The subject appeared pale and he was looking around continually as if he were looking for anyone that might be paying particular attention to him.

His age and his nervousness and his luggage were all significant factors that were consistent with the characteristics of the profile.

Q. As to ---

THE COURT: Why?

THE WITNESS: The profile was put together by Detroit D.E.A. based on approximately a hundred drug arrests that they had made at their airport, at the airport. And they looked back over all the arrests they made from January of '74, to February of '75, and they found that the persons who had been arrested shared numerous common characteristics, one being they were twenty-five to thirty-five years of age; that their dress was similar in that they were casually dressed. They bought one way cash tickets, primarily from Los Angeles to Detroit, and were primarily at that time involved in heroin trafficking. But they also had other kinds of narcotic cases.

Based on that age, some other characteristics that Detroit found, we instituted our program. We found that

one of the characteristics that was common here when we looked back at our arrests, American Tourister suitcases seemed to be standard issue for marijuana smuggling.

This was simply something we observed by looking back at the arrests and looking back at pictures of all the suitcases. And they were a light brown and a light silver color with combination locks on the suitcases, kept reappearing over and over again. And one subject told us that he had purchased ---

MR. BLOCK: Objection.

THE COURT: All right, sustained.

A. [Continuing] For that reason, the fact that the Defendant was nervous in appearance, looking around at other persons as though he might be looking for possibly police officers, knowing that he was carrying two suitcases full of marijuana and the types of suitcases and his age and general dress appearance were all consistent with our experience here in Miami and the drug courier profile that we had started working from. So that attracted my attention immediately.

Q. [By Mr. McMaster] Officer, you stated, "I work at the terminal eight hours a day, five days a week." You watch persons, is that correct?

A. As much as possible when I am not in Court, yes, sir.

Q. Approximately how many persons have you observed?

A. There would literally be thousands in the last six months.

Q. Would it be unusual in your opinion to see someone nervous at the Airport?

A. Well, people at the Airport, some of them are in a hurry, and some of them really don't care about flying. That might be your typical white knuckle type flyer, or they might be meeting somebody. So people are acting in different ways.

What has been my experience, though, is that persons who are looking for somebody will look around, looking for that one person.

Persons who don't like to fly are generally fidgeting and talking to one another or maybe just exhibiting some characteristics of uneasiness. The people in my experience that have ultimately been arrested in possession of narcotics seem to look around and study anyone that is around them to try -- and it appears that they are studying each person. So, in my experience it has been something that is a perceptibly different type of nervousness to us. That word, that may be the wrong word, but ---

Q. With regards to the Defendant, Mark Royer, would you say based on your experience and observations made at the Miami International Airport that his type of nervousness was different that the white knuckle airline passenger nervousness that you testified about?

MR. BLOCK: I am going to object. There is no way that this witness is qualified to nor can he speculate on different kinds of nervousness or what causes it.

THE COURT: I think he's really already answered it to begin with, so objection is sustained.

Q. [By Mr. McMaster] Why were you watching that particular flight, Officer?

A. It was a flight to the west coast which is one that is common. It was flight number 136 -- or correction, it was flight 136 to New York which departs

* * *

Detective, how far away from the Defendant were you at this point?

A. Approximately twenty feet.

Q. And were you able to see the Defendant clearly or was your view obstructed by anything?

A. We could see him clearly. There were a number of people standing around, but we kept a constant surveillance on him.

Q. At the time that he drew this large roll of bills that you testified about out, were you able to see the denominations on the bills?

A. No, sir. I couldn't see the denominations. I just observed that it appeared to be an extremely large number of bills.

Q. What particular significance, if any, did you attach to the large number of bills?

A. Well, the common characteristic from the D.E.A. profile was that the people paid cash for their tickets, which would allow them to use any name that they wanted to without having to provide any kind of proof of identification as would be the case if they were to use a credit card or check. And small denomination bills were also prevalent in the D.E.A. profile. A large number of bills was significant in that regard.

Q. What, if anything, did you do at this time?

A. Well, we continued to watch his activities as he purchased his ticket.

Q. What happened next?

A. He was then given two stick-on adhesive labels which are required by the airlines to be attached to any bag that is going to be checked in. And we watched him fill out the labels and attach them to the two bags.

Q. Detective, you testified you are about twenty feet away from him at this point?

A. Yes.

Q. Were you able to see what he filled out on the labels?

A. Well, as soon as he filled out the labels and the ticket agent put them on the conveyor belt, I went to the end of the line where the conveyor goes. And the two bags said, "Holt," H-o-l-t. And the word "La Guardia," was written underneath them.

Q. What, if anything, did you take those two words to mean?

A. Holt, I assumed to be the person's last name. And La Guardia, the irport he was flying to.

Q. Are you familiar with the airlines regulations regarding baggage identification?

A. Yes, sir. They require name, address and phone number.

Q. In your opinion, did the tags filled out by the Defendant comply with those particular regulations?

A. They didn't comply with the regulations that I am familiar with. And they were also consistent with other

investigations and arrests that I have performed in that only the last name, sometimes not even a city will be attached whereas a person who is truly concerned about the identification uses ---

MR. BLOCK: Objection.

THE COURT: Sustained.

A. [Continuing] Whereas other people ---

MR. BLOCK: Just a minute.

THE COURT: Sustained.

Q. [By Mr. McMaster] Were the two bags that you observed with those labels "Holt, La Guardia," on them the same two bags you had observed the Defendant carrying to the counter?

A. Yes, sir.

Q. What, if anything, did you do at this time?

A. The subject left the ticket counter and ---

* * *

Office-Supreme Court, U.S.
FILED
JUL 22 1981
ALEXANDER L. STEVAS,
CLERK

80-2146

NO. 80-2416

IN THE
SUPREME COURT of the UNITED STATES
October Term, 1980

THE STATE OF FLORIDA,

Petitioner,

vs.

MARK ROYER,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Florida

SUPPLEMENTAL APPENDIX TO BRIEF OF PETITIONER ON JURISDICTION

JIM SMITH
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CALVIN L. FOX
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COMES NOW, the Petitioner, THE STATE OF FLORIDA, by and through its undersigned counsel, pursuant to Rule 51 of the Rules of the Supreme Court and moves this Honorable Court for rehearing and as grounds therefore shows:

1. That on May 26, 1981, this Honorable Court entered its order denying the State of Florida's Petition for a Writ of Certiorari, to wit:

> "The Court today entered the following order in the above entitled case.
>
> The petition for a writ of certiorari is denied. The chief Justice, Justice Blackmun and Justice Powell would grant certiorari and reverse the judgment." [Emphasis added].

On June 22, 1981, this Court granted a timely motion for an extension of time in which to file the present petition for Rehearing.

2. That the undersigned hereby certifies that the State's application shall be restricted to those permitted in Rule 51.2 and that the Motion for rehearing is presented in good faith and not for delay.

3. The Petitioner, The State of Florida submits that, in view of the several dissents to this Court's initial denial of certiorari, this Court plainly may exercise jurisdiction and the Constitutional analysis by the Florida Courts is plainly erroneous.

4. The Petitioner, The State of Florida, is caught upon the horns of a dilemma. The Florida District Court's opinion may not be facially significant to this court as a case upon which to exercise jurisdiction because it is a per curiam opinion without discussion. See, State v. Rodriquez, 389 So.2d 4 (Fla. 3d DCA 1980); but, see, Appendix attached hereto. But it is the succession of these opinions relying upon

the analysis in United States v. Mendenhall, ___ U.S. ___, 100 S.Ct. 1870 (1980) and Reid v. Georgia, ___ U.S. ___, 100 S.Ct. 2752 (1980), as announced in Royer v. State, 389 So.2d 1007 (Fla. 3d DCA 1981), which is significant to this Court and the exercise of its jurisdiction. See, also, Florida v. Harrison, U.S. Sup.Ct. Case No. 80-1319, cert. den., June 22, 1981.

In the present case, the State is faced with a "catch 22." The State is injured by a succession of per curiam opinions which are clearly erroneous but facially apparently not significant to this Court's jurisdiction, but collectively very important and uniformly devastating to the State's prosecutions. The state courts are also acutely aware of when this Court declines jurisdiction in the present matters. See, Appendix, attached hereto. The State is thus faced with a situation

where the denial of certiorari upon the present plainly erroneous decision doesn't really mean anything, but then it means a great deal to the state courts. Thus the clearly erroneous analysis persists, feeding upon itself.

These cases are significant and important to the exercise of this court's jurisdiction, because they plainly represent an erroneous departure of a fundamental nature from the proper Constitutional analysis in Reid and Mendenhall. The State submits that this Court, should treat the State's application from the per curiam opinion of the Florida District Court with the same fundamental significance that the Court has other per curiam opinions for criminal defendants. Consider, history of the case in, Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963). The Constitutional error herein

against the state, as reflected in the above statement by the dissenters, is as egregious and fundamental as that announced in Gideon.

5. In further support of this petition, the State would note that on June 16, 1981, the State timely filed its Petition for Certiorari in Florida v. Royer, U.S.Sup.Ct. Case No. 80-2146. Royer is on all fours with Mendenhall, but reaches a directly contrary result. Before Reid, but after Mendenhall, the panel opinion in Royer would have prevailed upon the en banc rehearing. Royer and the present district Court opinion under the guise of the Fourth Amendment, apply extraordinary analysis to all police conduct and consent transactions, which was rejected recently by this Court in Edwards v. Arizona, ___ U.S. ___, 29 Crim.L.Rep. 3037 (1981), to wit:

> "The issue in Schneckloth [1] [412 U.S. 218 (1973)] was under what conditions an individual could be found to have consented to a search and thereby waived his Fourth Amendment rights. The Court declined to impose the "intentional relinquishment or abandonment of a known right or privilege" standard and required only that the consent be voluntary under the totality of the circumstances."
>
> [Emphasis added]

In Royer and the Case at bar, the standard applied in the airport context is not the "totality-of-the-circumstances" standard as demonstrated by the Florida Court's view herein that any approach by a police officer under the Fourth Amendment is a stop.

6. The present case should be heard by the Court to explain and confirm articulable suspicion in the airport context within the meaning of Reid and as a companion case to Florida v. Royer, and for clarifying a sub-Terry transaction and consent under Mendenhall. The State would also urge the

Court to consider the matter herein as a necessary companion to the matter of Reid v. Georgia on its second application for review or upon approval by the Court of the Georgia Appellate Court opinion after remand, filed on April 9, 1981. See, State v. Reid, ___ Ga.App. ___, 29 Crim.L.Rep. 2133 (1981) [on remand from, 448 U.S. 151 (1980)]. In Reid the Georgia appellate Court has reaffirmed its alternative view reported at State v. Reid, 149 Ga.App. 685, 255 S.E.2d 71 (1979) that the transaction therein was indeed a consensual transaction. The present case, presenting what is articulable suspicion and consent in the airport context as contrast to Reid v. Georgia, is therefore also substantial and warrants the exercise of this Court's jurisdiction.

WHEREFORE, upon the foregoing and such other matters as this Court deems appropriate, the Petitioner, THE STATE OF FLORIDA, prays that this Honorable Court will reconsider and rehear the matter herein and upon reconsideration will grant the Petitioner's application for review.

RESPECTFULLY SUBMITTED, on this _____ day of July, 1981, at Tallahassee, Leon County, Florida.

JIM SMITH
Attorney General

CALVIN L. FOX
Assistant Attorney General

APPENDIX

THE MIAMI NEWS

Monday Afternoon June 22, 1981

COURT TOSSES OUT DRUG COURIER PROFILE

Combined Miami News Services

WASHINGTON - The Supreme Court today refused to let drug agents in Florida stop, question or search air travelers whose behavior fits a "drug courier profile."

The justices, without comment, left intact a Florida appeals court ruling that the "profile" program, begun by the federal Drug Enforcement Administration in 1974, is unconstitutional.

There is, however, at least one other similar appeal from Florida authorities pending at the high court. Today's action does not preclude the possibility that the issue will be granted review at some later date.

The case acted on today stemmed from the July 25, 1978, arrest at Miami

International Airport of Burr Stuart on cocaine-possession charges.

Two Dade County police detectives asked to talk with Stuart after observing his appearance and behavior in the airport terminal. Eventually, they asked for permission to search him and, when he offered physical resistance after initially agreeing to the search, Stuart was arrested.

Cocaine was found stored in Stuart's boot.

Assistant Florida Attorney General Calvin Fox, who originally argued that the drug profile was legal as a basis for searching suspected drug peddlers, said today that the ruling "doesn't affect the operations out there (at Miami International Airport) at all" because, he said, by refusing to hear the Stuart case, the Supreme Court did not set a precedent that extends beyond that case.

Drug agency spokesman Con Dougherty said today that his agency will continue using the profile.

The detectives who stopped Stuart were operating under a program similar to one carried out at more than 20 metropolitan airports nationwide. Uner the aegis of the Drug Enforcement Administration, officers search out passengers displaying characteristics and behavorial traits which...have tended to distinguish drug couriers from other passengers."

A Florida appeals court struck down Stuart's drug conviction, ruling in essence that all such "profile" stops are unconstitutional because they are not based on "probable cause" to believe a crime is being committed.

After the Florida Supreme Court refused to review that ruling, state Attorney Jim Smith sought help from the nation's highest

court.

Two Supreme Court decisions last year left the legal status of the drug agency-inspired airport program in doubt.

Office-Supreme Court, U.S.
FILED
FEB 2 1982
ALEXANDER L. STEVAS,
CLERK

NO. 80-2146
IN THE

Supreme Court of the United States

October Term, 1980

THE STATE OF FLORIDA,

Petitioner,

vs.

MARK ROYER,

Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District

---

JOINT APPENDIX

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Respondent

Petition filed: June 16, 1981
Petition Granted: November 30, 1981

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NOTE: THE JUDGEMENT OF THE FLORIDA DISTRICT COURT OF APPEAL FOR THE THIRD DISTRICT IS CONTAINED IN THE SUPPLEMENTAL APPENDIX TO THE BRIEF OF PETITIONER ON JURISDICTION at pp.1-79

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

January 25, 1978-Information filed charging Defendant with unlawful possession and possession with intent to sell.

March 8, 1978-Defendant files Motion to Suppress.

May 22, 1978-Trial Court denys Defendant's Motion to Suppress.

May 23, 1979-Defendat files Notice of Appeal.

December 8, 1979-Panel of Florida Third District Court of Appeals affirms denial of Motion to Suppress.

March 5, 1980-Order of Florida Third District Court of Appeal granting rehearing en banc.

April 14, 1980-Oral argument en banc in Florida Third District Court of Appeal.

September 9, 1980-Opinion of Florida Third District Court of Appeal, en banc, reversing trial Court's denial of Motion to Suppress.

March 18, 1981- Opinion of Florida Supreme Court denying Petition for Review.

[R1-R2]
IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT OF FLORIDA,
IN AND FOR DADE COUNTY

FALL Term, 1977

THE STATE OF FLORIDA INFORMATION FOR

vs

MARK ROYER

I UNLAWFUL POSSESSION OF CANABIS 893.13 (FEL.)

II MANUFACTURE OR POSSESSION WITH INTENT TO SELL, MANUFACTURE OR DELIVER CANNABIS

IN THE NAME AND BY AUTHORITY OF THE STATE OF FLORIDA:

JANET RENO, State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, information makes that MARK ROYER on the 3rd day of January, 1978, in the

County and State aforesaid, did unlawfully and feloniously have in his actual or constructive possession a controlled substance, to-wit: CANNABIS, meaning all parts of the plant cannabis sativa, including all varieties thereof, whether growing or not; the seeds thereof, the resin estracted from any part of the plant; and every compond, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin, in an amount greater than five (5) grams, in violation of 893.13 Florida Statutes, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

JK:erc
1-23-78
Jail NO. 78-389 Bkd. 1-3-78 Jkt.NO.222752
78-200 DIRECT FILE
J/Morphonios

And JANET RENO, State Attorney of the Eleventh Judicial Circuit of Florida, prosecuting for the State of Florida, in the County of Dade, under oath, further information makes that, MARK ROYER, on the 3rd day of January, 1978, in the County and State aforesaid, did unlawfully and feloniously manufacture, or possess with the intent to sell, manufacture, or deliver, a controlled substance, to-wit: CANNABIS, meaning all parts of the plant cannabis sativa, including all varieties thereof, whether growing or not; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt derivative, mixture or preparation of the plant, its seeds or resin, in violation of 893.13 (1)(a) Florida Statutes,

[R3-R4]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 78-200

THE STATE OF FLORIDA,
Plaintiff
vs.
MARK ROYER,
Defendant

MOTION TO SUPPRESS

Defendant, MARK ROYER, by and through his undersigned counsel, hereby files this his Motion to Suppress all physical evidence in this case, including one white suitcase, one grey suitcase, the contents of both suitcases, including a substance alleged to be marijuana and currency of the United States on the following grounds:

1. The property was illegally seized without a warrant.

2. The facts on which the motion is based are as follows:

a. The Defendant was observed in an airport ticket line by two police officers.

b. The officers were narcotics officers patroling the airport looking for people they thought might be carrying narcotics.

c. The Defendant, by reason of the fact that he placed his suitcases near the front of the ticket line, that he appeared somewhat nervous and that he paid cash for his ticket, made the officers suspicious that he might be a person involved in narcotics.

d. That Defendant purchased his ticket and began to move towards the

concourse to board his flight.

e. The Defendant, while engaged in lawful conduct, was stopped by the two officers who identified themselves as police officers and asked the Defendant to accompany them to a lounge area away from the main stream of airport traffic for questioning.

f. The Defendant was further detained and questioned which concluded in the officers searching the Defendant's suitcases.

g. The officers claim that they asked for and received consent to search Defendant's suitcases.

h. The alleged consent was obtained after the officers informed the Defendant that they suspected he was transporting narcotics and after he had been detained for a considerable period of time.

i. One of the officers admitted on deposition that he did not have probable cause to believe the Defendant was transporting narcotics.

j. The Defendant was not advised that he did not have to answer the questions, that the officers had no right to detain him and he was not informed that he could refuse to give his consent to the search.

3. The search of the Defendant's suitcases was conducted in violation of the Fourth Amendment to the Constitution of the United States, the Fourteenth Amendment to the Constitution of the United States and Article I, Section 12 of the Florida Constitution. The search was conducted without a warrant. The exception to the warrant requirement relied on by the State in the instant case is consent. It is clear, however, that the

Defendant did not voluntarily consent to the search and that his purported consent was a mere acquiescence to the authority of the officers caused by the illegal detention of the Defendant.

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IRWIN J. BLOCK, ESQ.

[T1-T79]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

STATE OF FLORIDA,)
Plaintiff,)

-vs-) CASENO.78-200

MARK ROYER,)
Defendant.)
)

The above-entitled case came on for trial before The Honorable ELLEN J. MORPHONIOS, Judge of the above-styled Court, at the Metropolitan Justice Building, 1351 Northwest 12th Street, Miami, Florida, on Monday, May 22nd, 1978, commencing at 9:30 o'clock A.M., pursuant to notice.

APPEARANCES:

JAMES McMASTER and
STUART ADELSTEIN,
Assistant State Attorneys,
on behalf of the State of Florida.

FINE, JACOBSON, BLOCK,
GOLDBERG & SEMET, P.A.,
on behalf of the Defendant.
By: IRWIN J. BLOCK, Esquire.

* * *

I N D E X

STATE WITNESS	DIRECT	CROSS	REDIRECT
William Johnson	5	36	48
DEFENSE WITNESS			
Mark Royer	51	59	-

[Thereupon, the following proceedings were had:]

THE COURT: Mark Royer.

Yours, Jim?

MR. McMASTER: I will be handling the motion.

MR. BLOCK: This case, by agreement of counsel, will be disposed of on the motion so it will not be a trial.

THE COURT: What kind of a motion?

MR. BLOCK: Motion to suppress. It will not be a trial so that your calendar can be arranged accordingly.

MR. McMASTER: I have called. The officers are on the way. They will be here in about five minutes.

THE COURT: We can do it this morning?

MR. BLOCK: Yes, ma'am.

THE COURT: Just have a seat and we will come right back to it.

[Thereupon, a short recess was taken, during which time other Court proceedings were had, following which this hearing resumed.]

THE COURT: What about Mark Royer?

Jim, where are you? Is that ready to go?

MR. McMASTER: Yes. If you want to pass it until the end, Mr. Block is outside.

THE COURT: All right. We will do that, then.

[Thereupon, a short recess was taken, during which time other Court proceedings were had, following which this hearing resumed.]

THE COURT: Mark Royer. Are we ready to go on that now, Jim?

MR. McMASTER: Yes, Your Honor.

THE COURT: Okay, Irwin?

MR. BLOCK: Yes.

THE COURT: Okay.

Any and all persons who are interested in the motion to suppress, please come forward to be sworn.

THE CLERK: All who are about to testify, raise your right hand.

THE COURT: You mean we waited all morning and it's only one witness?

MR. McMASTER: Yes, Your Honor. It's going to take some time.

[Thereupon, the witnesses were sworn.]

THE COURT: All right.

MR. McMASTER: Your Honor, for the purpose of the motion, State will stipulate that there was no search warrant and there was no arrest warrant. We are prepared to proceed on that basis at this point.

THE COURT: All right, Irwin. Your motion.

MR. BLOCK: State's going to put the officer on.

THE COURT: Okay, Jim.

MR. McMASTER: You want to have a seat?

THE COURT: No.

MR. McMASTER: Very well, Judge.

THE COURT: Go on.

Thereupon--

WILLIAM JOHNSON

was called as a witness on behalf of the State of Florida and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McMASTER:

Q Officer, would you please state your name and occupation?

A. William Johnson, police officer, Dade County Public Safety Department.

Q How long have you been employed as a police officer for the Dade County Public Safet De partment?

A Approximately three years.

Q Where are you currently assigned?

A Assigned to the Organized Crime Bureau, Narcotics Investigation Section, working the Airport Smuggling Detail.

Q Where in Dade County were you specifically assigned at the time?

A Miami International Airport.

Q How long have you been assigned at the Airport?

A Since November of 1977.

Q Is there a particular unit there?

A Yes, it's the Airport Detail.

Q How many members of the unit are there?

A Currently there is eight investigators and a Sergeant.

Q Do you work alone or with someone else?

A With a partner.

Q And on the date of the arrest, January 3rd of 1978, were you working alone or with someone?

A I was working with Detective Magdalena who is my partner.

Q With regards to your duties at the Airport, do you work any other location other than the Airport?

A Primarily it's the Airport.

Q What are your duties at the Airport?

A We are assigned to identify and apprehend persons involved in interstate smuggling of narcotics who are using the commercial airlines.

Q And what are your duty hours there?

A Basically, we work during the week Monday through Friday. We have three shifts: one that begins at 8:00 o'clock and the last shift stops at 10:00 o'clock P.M.

Q And what do you do during your duty shift?

A We observe persons at the Airport who are purchasing airline tickets. And we meet incoming flights from target cities in reference to drug smuggling.

Q What do you mean by "target cites" ?

MR. BLOCK: Objection. It's immaterial and irrelevant.

THE COURT: Overruled on the motion to suppress.

A [Continuing] Miami, for instance, is a high source city for cocaine and marijuana. And it has been shown that Los Angeles---

MR. BLOCK: Objection to what has been shown.

THE COURT: Sustained, I think.

Q [By Mr. McMaster] Officer, have you received training and instruction with regards to various patterns of narcotic activities been related to

certain cities throughout the United States?

A Yes, sir.

Q Would it be fair to say you concentrate your efforts at the terminal with regard to flights to and from those cities?

A Yes.

Q How many days at a time do you work at it?

A Five.

Q How many hours?

A Eight.

Q How many hours of those days would you be located on the terminals themselves observing passengers?

A Most of those eight hours, as much as we can. That's our primary responsibility.

Q And during your tour of duty are you in uniform or civilian type clothing?

Q Do you ever wear a uniform?

A No, sir.

Q Are you armed while you are there?

A Yes, sir.

Q Carry handcuffs?

A Yes, sir.

Q Police radios?

A No, sir.

Q Have you received training and instruction with regard not only to narcotics cities, identifying cities, but also what has become known as a drug courier profile?

A Yes, sir. When our unit was established it was established in corroboration with the Los Angeles Police Department Administrative Narcotics Section, and very closely with Agent Paul Marconey [phonetic], who at one time was assigned to Detroit, D.E.A. and developed what is known as the drug

courier profile.

Q You have worked directly with person who originated the drug courier profile?

A Yes, sir. I know him personally and we have had meetings with him.

Q Are you also in constant or--strike that.

Are you also in contact with other agencies regarding your particular type od investigations at the Airport?

A Yes, sir. The nature of our investigation requires that we call them directly in reference to suspect persons leaving our city en route to theirs. and they, likewise, call us when they have suspicious persons coming in to Miami.

Q Approximately how many other agencies are you in frequent contact with regarding these types of cases?

A Los Angeles Police Department almost daily. San Francisco, D.E.A. almost as regularly. Seattle, Washington, on a weekly basis. And during the week we receive calls from cities all over the Country.

Q Have you made arrests and given testimony in Court regarding cases such as this?

A Yes, sir.

Q Have you, in fact, traveled to other cities in the United States, throughout the United States and testified in other Courts regarding cases such as this?

A Yes, sir.

Q Specifically with regards to the date of January 3rd, 1978, were you employed in the Airport at that particular time?

A Yes, sir.

Q And that was the date you were working with Officer Magdalena?

A That's correct.

THE COURT: One second.

MR. McMASTER: Certainly.

THE COURT: Go ahead.

Q [By Mr. McMaster] Specifically with regards to the profile that you talked about, you have received training and instruction regarding the profile?

A Yes, sir.

Q And you are aware of how a profile came into being?

A Yes, sir.

Q On January 3rd of 1978, do you recall what your duty hours were on that date?

A I believe it was 9:00 to 5:00.

Q Your are talking about 9:00 A.M. to 5:00 P.M.?

A Yes.

Q And did there come a time when you were located at the Miami International Terminal?

A Yes, sir.

Q And specifically approximately noon to 12:30, did there come a time when you came in contact with a person---

MR. BLOCK: Your Honor, I submit at this time I have to object to leading.

THE COURT: Don't lead.

MR. McMASTER: Very well.

Q [By Mr. McMaster] Did there come a time on January 3rd, 1978, that you came into contact with a person who later became known to you as Mark Royer?

A Yes, sir.

Q Do you see that gentleman in the Courtroom today?

A Yes, I do.

MR. BLOCK: We concede identity.

Q [By Mr. McMaster] Where were you located at that time?

A I was at the National Airlines ticket counter observing persons who were

approaching that counter for the purpose of purchasing tickets.

Q How many persons were in the area at that time?

A I would estimate somewhere in the neighborhood of twenty. It was a fairly busy time of the day prior to their 2;00 o'clock departure flights.

Q The persons that you testified about were waiting to get tickets at that particular counter?

A That's correct. I would estimate that would be the number.

Q Were there other persons in the terminal area also?

A Yes. It was a normal business day at a normally fairly busy time of day.

Q Do you recall exactly or approximately what time it was you first observed Mr. Royer?

A At 12:30 P.M.

Q Where was it that you first observed Mr. Royer?

A I observed him carrying two American Tourister suitcases to the ticket line at National Airlines.

Q Had you received any prior information regarding Mr. Royer at that time?

A No, sir.

Q And what, if anything, drew your attention to him?

A The two suitcases, one was white in color and appeared used, and the other was a silver gray suitcase which appeared to be brand new. The subject appeared pale and he was looking for anyone that might be paying particular attention to him.

His age and his nervosness and his luggage were all significant factors that were consistent with the characteristics of the profile.

Q As to---

THE COURT: Why?

THE WITNESS: The profile was put together by Detroit D.E.A. based on approximately a hundred drug arrests that they had made at their airport, at the airport. And they looked back over all the arrests they made from January of '74, to February of '75, and they found that the persons who had been arrested shared numerous common characteristics, one being they were twenty-five to thirty-five years of age; that their dress was similar in that they were casually dressed. They bought one way cash tickets, primarily from Los Angeles to Detroit, and were primarily at that time involved in heroin trafficking. But they also had other kinds of narcotic cases.

Based on that age, some other characteristics that Detroit found, we institued our program. We found that one of the

characteristics that was common here when we looked back at our arrests, American Tourister suitcases seemed to be standard issue for marijuana smuggling.

This was simply something we observed by looking back at the arrests and looking back at pictures of all the suitcases. And they were a light brown and a light silver color with combination locks on the suitcases, kept reappearing over and over again. And one subject told us that he had purchased---

MR.BLOCK: Objection.

THE COURT: All right, sustained.

A. [Continuing] For that reason, the fact that the Defendant was nervous in appearance, looking around at other persons as though he might be looking for possibly police officers, knowing that he was carrying two suitcases full of marijuana and the types of suitcases and his age and general

dress appearance were all consistent with our experience here in Miami and the drug courier profile that we had started working from. So that attracted my attention immediately.

Q [By Mr.McMaster] Officer, you stated, "I work at the terminal eight hours a day, five days a week." You watch person, is that correct?

A As much as possible when I am not in Court, yes, sir.

Q Approximately how many persons have you observed?

A There would literally be thousands in the last six months.

Q Would it be unusual in your opinion to see someone nervous at the Airport?

A Well, people at the Airport, some of them are in a hurry, and some of them don't really care about flying. That

might be your typical white knuckle type flyer,or they might be meeting somebody. So people are acting in different ways.

What has been my experience, though, is that persons who are looking for somebody will look around, looking for that one person.

Persons who don't like to fly are generally fidgeting and talking to one another or maybe just exhibiting some characteristics of uneasiness. The people in my experience that have ultimately been arrested in possession of narcotics seem to look around and study anyone that is around them to try--and it appears that they are stydying each person. So, in my experience it has been something that is a perceptibly different type of nervousness to us. That word, that may be the wrong word, but---

Q With regards to the Defendant, Mark Royer, would you say based on your experience and observations made at the Miami International Airport that his type of nervousness was different than the white knuckle airline passenger nervousness that you testified about?

MR.BLOCK: I am going to object. There is no way that this witness is qualified to nor can he speculate on different kinds of nervousness or what causes it.

THE COURT: I think he's really already answered it to begin with, so objection is sustained.

Q [By Mr. McMaster] Why were you watching that particular flight, Officer?

A It was a flight to the west coast which is one that is common. It was flight number 136-- or correction, it was flight 136 to New York which departs just prior to the time of the flights

leaving for Los Angeles which is the one we watch closely.

Q You were there for the purpose of watching the flight going to Los Angeles; is that correct?

A That's correct.

Q Now, how long a period of time did you observe him right there at the ticket line?

A Probably fifteen minutes to twenty minutes.

Q And during that period of time what was the Defendant doing?

A Well, the National Airlines ticket counter has a roped off area that requires the people to stand in a line parallel to that counter, and then double back again to get to the ticket selling positions.

The Defendant was observed to carry the bags which appeared by his effort to be very heavy to begin with, and he sat the

two bags off underneath the rope. He would have to walk up there, weigh and then come back again, set the bags underneath the rope right next to each other in front of the ticket counter, and then constantly watch the bags as he walked through the ticket counter, never losing eyesight of the bags and paying very close attention to those bags.

Q What particular significance did your attach to the fact that he sat the bags down inside the ropes?

A Well, the fact that they were very heavy and cumbersome and hard to carry. that was why I figured he sat them down in there.

Q Is it a common observation of yours that persons who set their heavy bags there by the airline counter---

A Most people keep their bags with them. That would be what most people do.

Q What, if anything, did you do at this particular time?

A What happened next?

A We watched him and he was watching the bags and looking around and appearing, as I stated before, extremely nervous while he was standing in the line.

We observed him pull a large roll of bills from his left front pants pocket to pay for the ticket.

Q All right.

Detective, how far away from the Defendant were you at this point?

A Approximately twenty feet.

Q And were you able to see the Defendant clearly or was your view obstructed by anything?

A We could see him clearly. There were a number of people standing around, but we kept a constant surveillance on him.

Q At the time that he drew this large roll of bills that you testified about out,

were you able to see the denominations on the bills?

A No, sir. I couldn't see the denominations. I just observed that it appeared to be an extremely large number of bills.

Q What particular significance, if any, did you attach to the large number of bills?

A Well, the common characteristic from the D.E.A. profile was that the people paid cash for their tickets, which would allow them to use any name that they wanted to without having to provide any kind of proof of identification as would be the case if they were to use a credit card or check. And small demonination bills were also prevalent in the D.E.A. profile. A large number of bills was significant in that regard.

Q What, if anything, did you do at this time?

A Well, we continued to watch his activities as he purchased his ticket.

Q What happened next?

A He was then given two stick-on adhesive labels which are required by the airlines to be attached to any bag that is going to be checked in. And we watched him fill out the labels and attach them to the two bags.

Q Detective, you testified you are about twenty feet away from him at this point?

A Yes.

Q Were you able to see what he filled out on the labels?

A Well, as soon as he filled out the labels and the ticket agent put them on the conveyor belt, I went to the end of the line where the conveyor goes. And the two bags said, "holt,"H-o-l-t. And the word "La Guardia," was written underneath them.

Q What, if anything, did you take those two words to mean?

A Holt, I assumed to be the person's last name. And La Guardia, the airport he was flying to.

Q Are you familiar with the airlines regulations regarding baggage identification?

A Yes, sir. They require name, address and phone number.

Q In your opinion, did the tags filled out by the Defendant comply with those particular regulations?

A They didn't comply with the regulations that I am familiar with. And they were also consistent with other investigations and arrests that I have performed in that only the last name, sometimes not even a city will be attached whereas a person who is truly concerned about the identification uses---

MR. BLOCK: Objection.

THE COURT: Sustained.

A [Continuing] Whereas other people-

MR. BLOCK: Just a minute.

THE COURT: Sustained.

Q [By Mr. McMaster] Were the two bags that you observed with those labels "Holt, La Guardia," on them the same two bags you had observed the Defendant carrying to the counter?

A Yes, sir.

Q What, if anything, did you do at this time?

A The subject left the ticket counter and proceeded toward Concourse F, which is the concourse that leads to the gates that are assigned to National Airlines. And my partner and I approached and identified ourselves as police officers to the Defendant.

Q How did you identify yourself as a police officer?

A We showed him our badges and identification cards and stated we were police officers with the Sheriff's Office.

Q What area of the Airport was he in when you first approached the Defendant?

A It was at the juncture of the main walk-way of the Airport where all the ticket counters are, where Concourse F meets.

Q This is an area open to the public?

A Yes, sir.

Q Is it roped off in any manner whatsoever from access to and from the public?

A No, sir.

Q Do you recall what, if anything, you said at that time to the Defendant?

A We asked him if we could look---

MR. BLOCK: Objection. The question was what he said, not what "We" said.

THE COURT: All right, sustained.

A. [Continuing] I asked the subject if he had a moment to talk. And after we identified ourselves, he said "Yes."

I asked him to show me his airline ticket, which he did, and I observed that it was a one-way ticket to New York in the name of "Holt," Mr. Holt.

We then asked him--I then asked him for identification. And he produced a New Jersey Driver's License in the name of Mark Royer.

Q During these particular questions and answers, how long a period are we talking about?

A Just slightly longer than it took me to relate it to you.

Q And do you recall the exact wording you used?

A I routinely ask people if they---

MR. BLOCK: Objection to "routinely."

THE COURT: Sustained.

Q [By Mr. McMaster] Do you recall what you used in this, the terminology that you used in this particular case?

A. Yes. I asked him if he had a moment to talk. He said he did. I then asked him for him to show me his airline ticket, which he produced. And subsequently his driver's license or some identification. He produced the driver's license.

Q With regard to the driver's license, what observations did you make regarding that?

A That it was in the name of Mark Royer. And that that was not the name that we had observed him write on the identification tags which he affixed to his baggage.

Q What happened next?

A We brought the obvious inconsistencies to his attention and asked

him if he could explain it. He said, "Yes," that a friend had made the reservations for him in the name of Holt.

Q How would you term the Defendant's attitude at this particular time?

A Extremely nervous. He was sweating from the forehead; his face was white and his hands were shaking.

Q At this particular time had you drawn your weapons?

A No, sir.

Q Had you grabbed hold of him in any manner?

A No, sir. We had asked him to talk to us.

MR. BLOCK: Objection.

A [Continuing] I had asked him to talk to us.

THE COURT: Hold it.

oh, yes. Don't use any "We's".

THE WITNESS: Yes, ma'am.

MR. BLOCK: Not only that, but he asked the question and he was not responding. Did you draw any weapons?

THE COURT: Did you draw any weapons?

THE WITNESS: No, ma'am.

MR. BLOCK: That's it.

Q [By Mr. McMaster] Did you grab hold of him, the Defendant, in any manner?

A No, sir.

Q Did you tell him he was not free to leave?

A No, sir.

Q All right.

What happened next?

A We told Mr. Royer that we were narcotics investigators, and that we had reason to suspect that he was transporting narcotics. And we asked him to accompany us to a room that was adjacent to Concourse F to get out of the general population of the Airport.

Q With regard to the room that you are talking about, how far away from the location you were at at this time was that room?

A No more than forty feet.

Q And would you describe the room for the Judge, please?

A When you walk through the door you are in the Stewardess Lounge of Air Florida. And on the left hand wall of that lounge is what used to be a large storage closet.

We use that---we were at the time using that as our room that we would use for interviewing subjects or for processing people that we--well, actually for anything that we needed to use it for.

Q Is that an official police room?

A No, it's a closet that had shelves on one end of it and we fitted a small desk and two chairs in the closet.

Q Did you have any police paraphernalia whatsoever in that room?

A No, because it wasn't an area that we could really secure that well.

Q At the time that you asked him to accompany you to that room, did you display your firearm in any manner?

A No, sir.

Q Take your handcuffs out?

A No, sir.

Q Did you have to grab hold of him physically and lead him to the room?

A No, sir.

Q What happened when you arrived at the room?

A We asked Mr. Royer if he would give us consent to search both of the suitcases.

Q All right.

Who asked?

A I asked Mr. Royer, I am sorry.

Q Do you recall what it was that you asked him?

A To the best of my recollection, it was something to the effect that we suspected that he was carrying narcotics, and that we would like him to open the suitcases to allow us to see what was in them to dispel that suspicion or to confirm that suspicion.

Q What, if anything, did the Defendant say at that time?

A He was extremely nervous about it and he didn't say anything specifically that I can recall. He produced a key out of his pants pocket and opened the white suitcase. And he stated to us that he didn't know the combination for the gray one which appeared to be brand new.

I asked him if we could open it, the gray one; did he have any objection, and he said, "No, go ahead." I explained to

him I might have to break it and he had no objection to that.

Q With regard to the white one, did he say anything prior to opening the suitcase?

A No.

Q Did he open it or did you?

A He unlocked it and I opened it.

Q What, if anything--what observations did you make regarding the contents of the suitcase?

A The white suitcase--

MR. BLOCK: Objection. The contents of the suitcase is not in issue here.

THE COURT: Sustained.

MR. McMASTER: Well, Judge, it's only an issue of fact that he found the controlled substance which is the basis---

THE COURT: I would assume he found that or we wouldn't be here with the

motion to suppress and a case filed. If it was Pampers, I wouldn't think we'd be here.

MR. McMASTER: I understand that, Judge. I just want the record to be clear that he did find the substance inside the first suitcase. All right.

Q [By Mr. McMaster] And did there come a time when you opened up the second suitcase?

A Yes. I obtained a screwdriver and opened the second suitcase.

Q Throughout this period of time from when you first approached the Defendant until he opened or unlocked the suitcase and you looked inside, how long a period of time had elapsed?

A We had observed him for fifteen or twenty minutes while he was standing in line. Our initial confrontation and conversation in the concourse lasted a very

few minutes in that my partner and I were--well, I was very suspicious that he was, in fact, carrying narcotics, and I wanted him to come into the small---

MR. BLOCK: Just a minute.

THE COURT: The question was: How long a period of time?

Q [By Mr. McMaster] How long a period of time?

A. Approximately from the time we first started the conversation in the hallway, I would say---until we found the controlled substance, that period of time?

Q Yes.

A No more than ten to fifteen minutes.

Q During this period of time was the Defendant ever handcuffed?

A No, sir.

Q Was he ever told that he was under arrest?

A No, sir

Q Had you, in fact, placed him under arrest?

A No.

Q Had you ever exposed your fire-arms?

A I don't believe so.

Q All right.

We will go back to your dress on the day in question, January 3rd. Were you wearing a coat?

A Yes, sir.

Q Did you always wear a coat in the terminal?

A Yes, sir.

Q What was the purpose of moving the Defendant to the office?

A For the protection---

MR. BLOCK: Objection.

THE COURT: Overruled.

A [Continuing] For the protection of the general public and also for the fact that we didn't want to embrrass the

person that we were talking to. In our investigations, some people seem to be a little nervous about having, opening their suitcase, and we don't want to embrrass them. And we have had a few persons who have physically resisted.

Q Throughout this period of time during your association with the Defendant, did the Defendant appear to have any difficulty in understanding what you were saying?

A No, sir. It seemed to be very casual. He appeared to be extremely nervous, but it was a very casual conversation.

Q At any time from the time you approached him until the time that you found the substance, did you ever attempt to hide the fact that you were police officers?

A No, sir. That was the first thing we told him.

Q What tone of voice was used during the entire encounter?

A Very similar to the way we are talking now.

Q What did you do after looking in the suitcase?

A We placed the Defendant under arrest for possession of marijuana and read him his Rights per Miranda.

Q Who read him his Rights?

A I did.

MR. BLOCK: That's immaterial for this motion.

MR. McMASTER: Judge, if I might make a proffer, the State is bound to prove certain elements in this particular motion and one of the element to be considered in the motion is the attitude and spirit of cooperativeness between the Defendant and the police officers.

MR. BLOCK: Objection to his

arguing what I was getting ready to rule. In other words, you are wishing to proceed with the advice of Rights to show the attitude?

MR. McMASTER: That's correct, Judge.

THE COURT: All right, go ahead.

MR. McMASTER: Thank you.

Q [By Mr. McMaster] And did he indicate that he understood his Rights per Miranda?

A Yes, he did. I stopped after each sentence and asked him. And he replied that he understood each.

Q Did he further indicate that he was will to speak to you without an attorney and fully understanding his Rights?

A Yes, he did.

Q And did you have a conversation with the Defendant regarding this particular incident?

A Yes, I did.

Q Regarding the details of the incident?

A Yes, sir.

Q At any time during this contact with the Defendant did you ever physically punish or abuse or threaten the Defendant?

A No, sir. It never became a situation where there was any physical contact at all.

Were you able to determine the Defendant's age?

A Based on his driver's license, yes, sir.

Q And how old was he?

A Twenty-one years old. Twenty-two years old.

Q And were you able to determine the Defendant's educational level?

A He told us that he was currently enrolled in college.

Q During any of this time did the Defendant ever appear to be evasive in his answers or discussions with you?

MR. BLOCK: Objection. Immaterial and irrelevant.

THE COURT: Overruled.

A [Continuing] No, sir.

Q [By Mr. McMaster] Did you ever inform the Defendant or tell the Defendant you would get a search warrant if he did not consent to the search?

A No, sir. That never became necessary because--

MR. BLOCK: Objection.

THE COURT: Sustained.

Q [By Mr. McMaster] Throughout this particular period, how many officers were involved?

A Two: my partner and myself.

Q At any time were there any more than two officers?

A No, sir.

Q Is everything you have testified to taken place in Dade County, Florida?

A Yes, sir.

MR. McMASTER: No further questions at this time.

MR. BLOCK: Your Honor wish to proceed at this time?

THE COURT: Yes, please.

CROSS-EXAMINATION

By MR. BLOCK:

Q Mr. Johnson, at no time prior to your opening the suitcase did you have any probable cause to place Mark Royer under arrest: did you?

MR. McMASTER: Objection, Your Honor. Calls for a legal conclusion.

THE COURT: Overruled.

A [Continuing] No, sir.

Q [By Mr. Block] All right.

Now, basically, your main duty is

to try to interrupt contraband from going into the airplanes and going into interstate commerce; is that not correct?

A Yes, sir.

Q And in your investigation you're mainly concerned with securing the contraband more than you are concerned with whether or not you have a proper arrest; is that not correct?

MR. McMASTER: Your Honor, I am going to object to that.

THE COURT: Overruled

A [Continuing] Absolutely not.

Q [By Mr. Block] Now, didn't you indicate in this case that you weren't so concerned about the arrest, but what you wre concerned about was securing the contraband to keep it from going into commerce?

A No, sir. A civil lawsuit is not worth my job.

Q Mr. Johnson, how many people have you seen carrying one old suitcase and one new suitcase?

A I really haven't noticed that particular fact. We have had-- I have made arrests in situations where several of the people we have--

Q Can you answer the question? The question was: How many people have you observed where you saw carrying one new suitcase and one old suitcase?

A Well, several.

Q Several.

And have you observed people carrying one new suitcase and one old suitcase who you did not stop and question?

A That's possible, yes, sir.

Q All right.

Now, in this case from your observations you had a suspicion that the young man might be carrying contraband; correct?

A Yes, sir.

Q And what you wanted to do was to confirm or refute your suspicion; correct?

A Yes, sir.

Q And with that in mind you and your partner decided to stop Mr. Royer; didn't you?

A We decided to go up and talk to him.

Q He was on his way to the concourse where the plane was to take off, I believe your testimony was; correct, sir?

A He was walking in that direction, yes, sir.

Q And you and your partner approached him as he was walking in that direction; didn't you?

A Yes, sir.

Q And the two of you stopped in front of him; didn't you?

A We walked up from the rear to the

side of him and I gave him -- showed him my identification.

Q You showed it from the back?

A No, from the side.

Q You came around to the side and you said, "We are police officers. We'd like to talk to you for a minute;" correct, sir?

A I asked him if he had a minute to talk to us, yes, sir.

Q And you showed him your badge?

A That is correct.

Q You showed your badge because you wanted to show your authority for stopping him; didn't you?

MR. McMASTER: Objection, Your Honor.

THE COURT: Sustained.

Q. [By Mr. Block] When you stop people who you just want to ask some questions of, you don't show your badge; do you?

A Yes, sir.

Q Everybody you talk to?

A In the line of duty, yes, sir.

Q Whenever you talk to someone at the Airport, whether you suspect that they are involved in contraband or not, you always show them your badge, is that your testimony?

A In the line of duty when ticket agents--when we are asking for information ---

Q Mr. Johnson, who asked him to produce the ticket, yourself or Magdalena?

A I recall that I did.

Q Did you when you stopped him tell him that he had a right not to talk to you?

A No, sir.

Q Did you when you stopped him and asked for his airline ticket tell him he had a right not to produce it for you?

A No, sir.

Q When you looked at the airline ticket and then asked for the driver's license for identification or asked for identification, did you tell him at that time that he had a right not to produce any driver's license?

A No, sir.

Q Did you while after you had stopped him tell him that he had a right to move on?

A No, Sir.

Q You are now tall, sir?

A Approximately six foot one.

Q And Mark is about five seven?

A About equal to my, partner's height.

Q And you and your partner were on either side of him?

A The three of us were in close proximity.

Q And he obeyed whatever you asked him to do; didn't he?

A Yes, sir.

Q And who held onto the ticket that

you asked him for, you or your partner?

A I recall that I did.

Q And the airline ticket had the stubs on it for the baggage?

A Yes, sir.

Q And then did you go after the baggage?

A Yes, sir.

Q You used the stubs that you had from the ticket he had produced to reclaim the baggage; didn't you?

A Well, it was more on my observations of what the bags looked like because downstairs there is a number of bags. I looked for the one, and then confirmed it by the ticket number. And also by the name on the stick-on label that I observed on the bags.

Q And you didn't take him with you to get the bag; did you?

A Take who?

Q Mr. Royer.

A No, sir.

Q Who took him into the room?

A My partner. And I went in with him and then I went downstairs to get the bags. My partner remained in the room.

Q You took him into a room that you used for interrogation?

A We used it, yes. That's one of the purposes.

Q And notwithstanding the fact whether you call it an official police room or an unofficial police room, it's a police room?

A Not any more. We lost it.

Q I apologize to you. It was at the time?

A Yes, sir. It was something we could use, but--

Q There was no one else in there?

A No, sir.

Q So, one of you watched him while the other one went after the bag?

A That's correct.

Q And up to this time had you told him he could leave the room?

A No.

Q Had he been warned of his Constitutional Rights up to this time?

A No, he hadn't, if you are referring to the Miranda Warning.

Q Yes.

A No, sir.

Q At some stage along here someone asked him to empty his pockets out. Was that you or your partner?

A I don't recall that.

Q Do you recall that he laid everything down and in amongst his belongings was the key to the suitcase?

A No, sir.

Q Would that have been Magdalena

while you were gone?

A I don't recall that anything came out of his pockets other than the key which he took out, which he produced himself.

Q Well, let's get to that for a moment. Did you tell him he had a right to refuse to have his suitcase searched?

A No, sir.

Q You had stopped him with your badge; correct?

A We had shown our badge upon approaching, yes, sir.

Q Had taken him into this interrogation room: correct?

A We asked him to accompany us and he did.

Q And at this point now you have got his airline ticket which he can't get on the plane without it; can he?

A He couldn't get on without it, but

he never asked for it back.

Q You never offered it back to him; did you?

A That's correct, also.

Q And you hadn't placed him under arrest yet?

A That's correct.

Q All you still had was suspicions you were still trying to confirm?

A That's correct.

Q So, while he was being held in this room by Magdalena you went after the suitcases?

A I recall that I asked him.

Q And he didn't even open it; did he?

A He unlocked the white one because he had the key. They gray one he stated he didn't know the combination, so he couldn't open it.

Q Did you tell him he had a right not to unlock the suitcases?

A No, sir.

Q Did you tell him he had a right not to have his personal belongings searched?

A No, sir.

Q And the only persons in the room besides Mark were two police officers?

A That's correct.

Q And you already had told him that you suspected that he was carrying narcotics?

A That's true.

Q So, you told him you suspected that; you took him into a room and you said you asked him under those circumstances if you could search his suitcase?

A Yes, sir.

Q Your whole object was to get a look in the suitcases; wasn't it?

A Yes, sir.

Q Prior to the time the suitcases

were opened, you had not seen him commit any crime; had you?

A No, sir.

Q Who held the airline ticket while you went after the suitcases?

A They were left in the office.

Q Didn't you take them with you for the baggage stubs?

A No, sir.

Q What did you do? You just pulled off the baggage stubs?

A Yes, sir.

Q Your left them with who, Magdalena?

A Yes, sir.

Q The airline ticket was never returned to him until after the suitcases were opened: were they?

A No, sir.

Q He never told you--I am sorry, strike that. At no time after you stopped him was he ever told he could leave; correct?

A No, sir. He never asked.

Q Please answer the question.

Did you ever tell him he could leave once you stopped him?

A No.

MR McMASTER: If I might, I believe the question has been asked about five or six times already.

THE COURT: It has.

Q [By Mr. Block] And you never told him that he did not have to talk to you?

MR. McMASTER: Objection; same basis.

THE COURT: It is repetitious.

Q [By Mr. Block] And you never told him that he did not have to consent to the search; did you?

MR. McMASTER: Objection, Your Honor: same basis.

THE COURT: Same ruling.

Q [By Mr. Block] Basically, he

acquiesced in everything that he was asked to do; did't he?

A Yes, sir. He was very cooperative.

MR. BLOCK: I have nothing further.

REDIRECT EXAMINATION

By MR. McMASTER:

Q Detective, Mr. Block has indicated that you are not concerned with the ultimate outcome or the legality of your arrest. Isn't it a fact in certain situations where the the Defendant refuses consent you let them get on the airplane?

A Yes, sir. I have done that.

MR. BLOCK: I object and move to strike it in this case.

MR. McMASTER: Judge---

THE COURT: Sustained.

MR. McMASTER: Judge, I would argue that the Defendant made the argument that the police officers are not concerned

with the legalities of the arrest. He's indicated that the officers would proceed with illegal searches regardless of the circumstances.

THE COURT: The officer rather adequately stated it when he answered it that, "A civil suit wasn't worth it."

MR. McMASTER: Very well, Judge.

Q [By Mr. McMaster] Detective, did you go down to get the bags before or after the Defendant consented to the seach of these bags?

MR. BLOCK: Objection.

THE COURT: Rephrase it as to before or after his conversation.

Q [By Mr. McMaster] Before or after your conversation with the Defendant, did you go down and get the bags? Before or after the conversation with the Defendant in the room?

A After we talked to hm.

Is it unusual after an arrest to have a Defendant empty his pockets on the table?

MR. BLOCK: I am going to object to what happened after the arrest; we are concerned with what happened prior to the arrest.

MR. McMASTER: Judge, the Defendant has made an argument that the officer required the Defendant to empty his pockets and there was no testimony as to those particular facts. I am merely proffering that it's entirely consistent with the facts and entirely reasonable that the act could have been done subsequent to the Defendant's arrest.

THE COURT: Did you ask him to empty his pockets after the arrest?

THE WITNESS: Yes, ma'am. We routinely inventory persons after they are arrested.

MR. McMASTER: No further questions.

THE COURT: Recross, Irwin?

MR. BLOCK: No, Your Honor.

THE COURT: Who do you want?

MR. McMASTER: That's it.

MR. BLOCK: Your Honor, I can put the Defendant on but I honestly don't consider it necessary under the facts of this case.

THE COURT: Why don't you both stipulate to what his testimony would be unless---

MR. McMASTER: I don't really know what his testimony is going to be.

MR. BLOCK: Well, his testimony would be that---

THE COURT: I think you better make the best record you can, Irwin.

MR. BLOCK: Then, let's put him on the witness stand.

Okay, Mr. Royer.

Swear him, or was he?

THE CLERK: He was sworn, Your Honor.

Thereupon--

MARK ROYER,

the Defendant herein, was called as a witness on his own behalf, and after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BLOCK:

Q State you name.

A Mark Royer.

Q How old are you, Mark?

A Twenty-two.

Q Where do you live?

A New Jersey.

Q On the day in question after you purchased your airline ticket, what next

occurred?

A I turned away from the counter, was walking towards the concourse. The agent had told me where the point was at and I was approached by two officers, or two men.

Q What happened when they approached you?

A They took out their badges; said they were officers of the law and that they wanted to talk to me.

Q And what did you do then?

A I stayed and figured that I was going to have to talk to them.

Q Why?

A Because they were police officers and I felt that that's what I had to do.

Q Did they tell you that you had a right to leave or not to talk to them?

A No, they did not.

Q All right.

What next happened after the officers were talking to You?

A They said they wanted to see my airline ticket which was in my hand.

Q What did you do?

A I let them look at it.

Q Why did you give it to them?

A Because they had asked me to. They were police officers and I thought I had to.

Q Did anyone tell you you did not have to produce the airline ticket?

A No.

Q Did anyone tell you you had a right to leave at that time?

A No, they did not.

Q Did you produce it voluntarily?

A When they asked me I did.

Q Why?

A Because they were police officers and I felt I had to.

Q Did they give you back the airline ticket at any time after that?

A No, they did not.

Q After taking your airline ticket what was next said?

A They said they wanted some I.D.

Q Did they tell you that you had a right not to produce any I.D.?

A No, they did not.

Q Did you produce it?

A Yes, I did.

Q Why?

A Because they were police officers and I thought I had to do what they told me.

Q Did anyone tell you you had a right to leave?

A No.

Q And what happened after that?

A I gave them my wallet. I took out my wallet and produced my license, I believe.

Q After they looked at that, what happened?

A They noticed the discrepancy in the names.

Q And then what, if anything, did they tell you to do?

A Next they asked me why there was a discrepancy, and I told them that I had not made the reservations.

Q All right.

After that, what, if anything, did they tell you to do?

A They said that they wanted to talk to me in private; to come with them into a lounge.

Q Did they tell you that you had a right not to go with them?

A No, they did not.

Q Why did you go with them?

A Because they were police officers and I thought I had to; that they had

to; that they had found a discrepancy in the names that there must be something wrong.

Q Did you think you had the right to leave at that time?

A No, I did not.

Q And that is why you went with them?

A That is correct.

Q Did the officers, one or both of them, or you together with them get the suitcases afterwards?

A I did not get them. When I had gotten the ticket the agent did not put them on the conveyor belt. He put them between the counter and the conveyor belt. Then, one of the officers went to the end of the conveyor belt and signaled for them to be brought down. And they pulled them right out and they never went in the back room.

Q Did you give them permission to take your suitcases?

A No, I did not.

Q At that point did they even ask you for permission?

A No.

Q Okay.

So, where were you and the suit cases taken?

A I was right where they had first stopped me.

Q And where did you end up?

A I guess another two hundred feet down there was a small room that they took me into.

Q Now, after you and the officers got settled in that room, did anyone stay in the room with you besides the officers?

A There was a woman there when we first went in and she left.

Q Why didn't you leave?

A I didn't feel I had the right to. These were two police officers and they

had told me to come with them.

Q Had anyone placed you under arrest yet?

A No.

Q Had anyone advised you of any of your Constitutional Rights?

A No.

Q At that point what conversation, if any, was there with reference to the suitcases?

A Well, on the way to the room one officer said that they had been waiting for me all morning. They expected me earlier and that he wanted to know how much pot was in the bags. And that I must have been crazy to try to do this because there was always guards around.

Q Did you respond in any way tc that?

A I said I did not know what they were talking about.

Q And then what happened after you got into the room?

A I sat in the outer room. There was what the officer described as a closet on the other side, and I guess they did a little--I don't know what they were doing. And then, they brought me in the inside room.

Q And then what happened?

A They asked me to empty my pockets.

Q Did you do it?

A Yes, I did.

Q Had you been placed under arrest yet?

A No, I had not.

Q Did anyone tell you you had a right not to empty your pockets?

A No, they did not.

Q And what ahppened after you emptied your pockets?

A There was a key that was on the

desk top that was a luggage key, and they told me to open up the suitcase.

Q Did you unlock it?

A I unlocked it

Q Well, why did you do it?

A Because they had told me to. I felt I had to.

Q Why didn't you leave?

A I didn't think that was a possibility. I didn't want to get hurt.

Q Why did you unlock the suitcase?

A Because they had told me to.

Q Did anyone tell you you had a right not to submit to a search?

A No.

Q Did anyone even ask for consent to look into the suitcase?

A Not that I recall. They said they wanted to look inside.

Q And they just looked?

A Told me to unlock it and I unlocked it. They opened it.

Q Did they ever give you back your airline ticket before this entire incident was over?

A No.

Q Did they return your identification or did they retain that?

A Well, when I had my--they told me to empty my pockets. It was on the desk, also.

Q Did you consent to being stopped by the police?

MR. McMASTER: Objection, Your Honor: calls for a legal conclusion.

THE COURT: Sustained.

MR. BLOCK : You may inquire.

CROSS-EXAMINATION

BY MR. McMASTER:

Q Mark, you are twenty-two years old?

A That's correct.

Q You have never been convicted of a crime before isn't that correct?

A That's correct.

Q Were you a student at this time?

A No, I just graduated college.

Q You just graduated from college?

A Tha's right.

Q You wre a student on January 3rd, 1978?

A Yes, I was.

Q You were in your senior year of college at that time?

A Yes.

Q And what was your major?

A Communications

Q What is the college?

A Ithaca College.

Q Where is that?

A Ithaca, New York.

Q How long had you been going to college in Ithaca, New York?

A Three and a half years.

Q You have relatives in Miami?

A No, I do not.

Q What was your purpose in being in Miami on January 3rd, 1978?

MR. BLOCK: I am going to object. That's immaterial and irrelevant.

THE COURT: Sustained.

Q [By Mr. McMaster] You were the person in the Airport on January 3rd, 1978; is that correct?

A That is correct.

Q And you were the one that carried the bags in; is that correct?

A That is correct.

Q You had the key to the one suitcase?

A That is correct.

Q At the time that the officers approached you did they grab hold of you or hit you or strike you in any manner whatsoever?

A No.

Q Isn't it a fact that their entire manner was very courteous?

A When they first introduced themselves, yes.

Q Did you buy the ticket there when the officers watched you walk in?

A Yes, I did.

Q And did you pull from your pocket a large number of bills?

A Not many more than it takes to pay for the plane flight?

Q How much did it take to pay for the plane flight?

A I am not quite sure. I believe about a hundred and ten, something like that.

Q Are you employed?

A No, I am not.

Q Full time student?

A Yes, I am.

Q Did you make a reservation for the plane?

A No, I did not.

Q Who did?

MR. BLOCK: Objection, immaterial and irrelevant.

THE COURT: Sustained.

MR. McMASTER: Judge, if I might---

THE COURT: Sustained.

Q [By Mr. McMaster] Were you aware that the reservations for the plane had been made in the name of Holt?

A Yes, I was.

Q Is there a person named Holt that you know of?

MR. BLOCK: Objection.

THE COURT: Sustained. Let's get to the reasonableness or unreasonableness of the search as required under the Constitution.

MR. McMASTER: Very well, Your Honor.

Q [By Mr. McMaster] At the time that

you went into the room with the officers, did they at that time grab hold of you by the arm and escort you to the room?

A No, they were on either side of me.

Q Did they tell you you were not free to go and you had to go with them?

A Say that one more time?

Q Isn't it true that the officers---

MR. BLOCK: I didn't hear that answer.

MR. McMASTER: He asked me to repeat it, I believe.

MR. BLOCK: I am sorry.

MR. McMASTER: I will restate the question.

Q [By Mr. McMaster] Isn't it ture that the officers, when they asked you to goto the room, were still very courteous at that point?

A In a manner of speaking, as I said, the one officer was what I would consider

telling me that I had pot in the bag.

Q Did they ever pull any guns on you?

A No, they didn't pull any guns on me.

Q Did they handcuff you?

A Not out in the terminal, no.

Q Did they threaten you with any physical punishment?

A Not out in the terminal.

Q Inside the room did they pull any guns on you?

A Didn't pull any guns, no.

Q They eventually handcuffed you after you were placed under arrest; correct?

A They handcuffed me.

Q At the time that you were place under arrest, at the time they saw the marijuana; isn't that true?

A I believe so.

Q You stated that prior to your consent to the search, they demanded that you empty your pockets on the table?

MR. BLOCK: I am going to object. He never said he consented to any search.

THE COURT: Rephrase.

Q [By Mr. McMaster] Isn't it true that you testified they required you to place all of your belongings from your pockets on the table?

A That's right.

Q And a key was placed on the table?

A It came out of my pockets

Q It was right on the table where the officer could see it?

A That's right.

Q Didn't you also testify they never asked you for a consent? They just said they wanted to look in your bags?

A That's right.

Q That they told you to unlock the

the bag?

A Doesn't it seem a little unusual to you when they would tell you to pick up and unlock the bag when they can do it themselves if they didn't care that they would ask---

MR. BLOCK: Objection. That's not the---

COURT: Sustained.

Q [By Mr. McMaster] Isn't it true that after you were placed under arrest that the police officers read you your Miranda Rights?

A After I was arrested, yes.

Q And you, in fact, spoke, to them, didn't you?

A Yes.

Q Was that because you thought that they were police officers and they had a right to speak to you after the Rights?

MR. BLOCK: Ojection. That's

immaterial and irrelevant at this point.

THE COURT: Sustained.

MR. McMASTER: No further questions at this time.

MR. BLOCK: No redirect, Your Honor.

THE COURT: Have a seat, please, Mr. Royer.

Argument.

MR. BLOCK: If Your Honor please, we respectfully submit that the search in this case was illegal, unconstitutional, in violation of the Defendan'ts Rights under the Fourth and Fourteenth Amendments to the Constitution of the United States, and the applicable provisions of the Florida Constitution that it is obvious that this young man was in custody; that he was being held by police officers; that he acquiesced and obeyed what they asked him to do.

And that is not consent under the law and that there is absolutely no basis here.

If Your Honor please, the evidence uncontradicted shows they stopped him on suspicion. No warnings. Didn't tell him he had a right to go.

They took his ticket from him. Never gave it back to him. That'san arrest. They took away from him the means by which to leave.

Not only that, they didn't ask him to accompany them into the room. The officer says: "We told him to come into the room with us."

MR. McMASTER: Objection. I don't believe that was the testimony, Judge.

THE COURT: Well, the record will speak for itself on the testimony that has been offered.

MR. BLOCK: Let's accept that they asked him to accompany into the room.

Under those circumstances, when they stopped him, questioned him, took his ticket away and there was nothing else that he could do but follow them, the people who were holding his ticket, he was technically in custody and under arrest, notwithstanding whatever they said or didn't say. Taking him into that room was illegal and unconstitutional. That was an arrest. That was in custody.

Everything that followed thereafter was illegal, if Your Honor please. Your Honor's probably familiar with the case o Blizzard vs. State, 336 So.2d 132.

In this case the officer said that he didn't make any arrest. He asked the young man, the youth to go along with him for questioning. And they said Bailey [phonetic] made no arrest in the technical and restricted sense when he asked Opollen [phonetic] to accompany him to

Headquarters for questioning. But the absence of a formal arrest does not end the requirement of a Fourth Amendment mandatory arrest whether announced or unannounced and it applies a rule of reason to both greater and lesser intrusions to protect privacy. The threshold issue then is whether there was a personal seizure.

That's a threshold issue, was there a seizure of this young man stopped by police officers without cause, without basis. They admit they had no right to make an arrest, but they had suspicion, and they wanted to get into the suitcases. And then they keep his ticket. He can't leave. If that isn't an indication you are under arrest, then there is no indication that you are not under arrest if the officer doesn't tell you you are under arrest.

They took his ticket from him and they kept it. And that's the threshold issue.

And the Court goes on, the Florida Court and quotes from the U.S. Supreme Court and says obviously not all personal intercourse between policemen and citizens involves seizures of persons, only when the officer by means of physical force or show of authority has in some way restrained the liberty of a citizen may we conclude that a seizure occurred.

The officers showed their authority and restrained the liberty of this young man at that point. That was illegal. They took his ticket from him and they said--we will accept what the State says--"Accompany us."

They didn't say he didn't have to go; they said, "Accompany us." And they have got his ticket and there is nothing he can do but accompany them.

If he ran away he'd get shot under those circumstances.

MR. McMASTER: Objection, Judge.

THE COURT: Sustained.

MR. BLOCK: We respectfully submit that not only is that the Florida case law, but that's the general law with reference to the issue of whether or not this was a consent.

Your Honor, I don't really think it's necessary to argue all these cases. I just cannot see how the actions in this case do not constitute a restraint of the young man's liberty when he is stopped by police officers; asked to accompany them. They take his airline ticket. He cannot leave, obviously. Then he is in their custody. They are holding onto the airline ticket. They take him into a police room for questioning.

What would have happened if he had run away at that point?

And he told you, and there's no contradiction, that he went because he thought he had to go. Obeying a policeman is not consent. It is not a voluntary action on the part of an individual, and we respectfully submit that taking everything that the officer said it's interesting, also, Your Honor, that the officer said that he asked Mark to open the suitcase, to unlock it. And then the officer opened the suitcase. He didn't ask Mark to open the suitcase. The officer went that far, but really we have to get back to the threshold issue. They stopped him on suspicion. They had no basis for stopping him, no probable cause to make an arrest.

They took his airline ticket and invited him into a police room for interrogation.

That is an arrest. That is a seizure

of the individual. Everything that follows after that is illegal and unconstitutional.

MR. McMASTER: Most respectfully, Judge, with regards to the issues which Defense Counsel has brought forward, what he terms to be the threshold issue of the illegal arrest, as he terms it, and then everything subsequent to that must be illegal. He is saying that because there is an illegal arrest the consent is invalid.

I would submit that the case law does not say that, per se, Judge. It would say that an illegal arrest is one of circumstances to be considered as to whether there is a valid consent, but the real issue in this case, Judge, is whether there was, in fact, Judge, a free and voluntary consent on behalf of this Defendant, whether the officers' observations and training were the basis for a

legitimate stop and whether, in fact, the circumstances surrounding the free and voluntary consent or whether the circumstances surrounding the consent were, in fact, free and voluntary.

The State's contention, Judge, and of course we are bound to show the Defendant's state of mind at the time of the incident, and we, of course, have no direct line into his brain, so we can only show the circumstances.

The State contends originally the initial approach by the officers first doesn't even fall under the standard unfounded suspicion.

Under Terry, Terry versus Ohio case, the U.S. versus Pope case, and the local case of State versus Wigfall, cited 323 So.2d, 587, indicates that all conversations, or contacts between police officers and individuals is not a seizure

within the meaning of Terry.

State contends under the Wigfall case a situation where a police officer patrolling at 1:00 o'clock in the morning observing a car parked with a passenger in it in the parking lot of a bar, that's the only thing the officer had prior knowledge that the parking lot was a high crime rate area and that the parking lot had been used for dropping off stolen cars in the past. Based on the officer's previos experience and training regarding the area and his observation, there was a car with somebody in it at 1:oo o'clock in the morning, he approached the person seated in the car; asked for identification. The I.D., the driver's license was given to the police, and an arrest ensued based on later circumstances which came later, but the Third District ruled in that case there was not even a stop.

Everything that occured there was purely voluntary between the Defendant and the police officers. We would argue that the initial approach doesn't even fall under Terry. It requires nothing. But, even assumed arguendo that Your Honor assumes and rules that it is a stop, that the police officers have to have something, then the State argues the officers have founded sus' 'cions.

The officers testified as to their observations, their training, their knowledge regarding the type airport, type cases, the fact they had been in contact with all these different circumstances which in his experience and training indicated that he had something to found his suspicions, and that is what is required, a founded suspicion.

Case law, Judge, all indicated that if an officer has a founded suspicion he is entitled to detain to prove and detain a suspect under Terry principle. And detain means he can keep him there until the circumstances surrounding the suspicions in his mind are adequately explained.

The State contends that if you are going to hold that it's estopped that the officer has testified to founded suspicion, that would justify the stop, it's a balancing test. All the Courts indicate it's a balancing test between interest of the State in pursuing the drug laws, enforcement of the drug laws and intrusion upon the Defendant.

Here we have a very minimal type intrusion where the officer is approaching in a public area, merely requesting identification. They don't even demand

it. The officers never pointed guns, never dragged out handcuffs; never take him anyplace personally. It's merely a cooperative type attitude between the Defendant and the police officers.

The police officers asked him to go into a room. He explained what the purpose was, to get him out of the main stream. And also for the privacy of the Defendant to cause him as little embrassment as possible.

The officer testified that there was no expression, there was no indication, "Well, we will get a warrant," or whatever.

And the test here, Judge, is totality of the circumstances as to the consent. You have a twenty-two old, I believe at that time a twenty-one year old, white male who was in his last year of college in New York, who was here, who was

in his last year of college in New York, who was here, who was not handcuffed; who was not beaten; who was not threatened; who was held for approximately ten minutes from the time he was first approached until the time that he gave his consent. A person who was requested for consent, specifically.

The police officers identified themselves. They didn't attempt to use any type of ruse or say that they were Customs employees or airline employees, or anything of that nature.

The State submits that the Defendant was aware of his Rights; the circumstances indicate that he was aware of his Rights; that he waived his Rights. He did give a free and voluntary consent. He was not threatened, forced or coerced in that particular consent.

THE COURT: Irwin?

MR. BLOCK: If Your Honor please, in brief reply, the case law is a search and seizure may be made without a search warrant if the individual freely and intelligently gives unequivocal and specific consent to the search uncontaminated by any duress or coercion actual or applied. That's what we have in this case.

Furthermore the case law is that the waiver must be an intelligent relinquishement of a known right or privilege. They must have told him of is right to object to and not consent to a search before they can say that he gave an intelligent waiver, expecially where the circumstances are such that there is either actual or implied duress or coercion.

Certainly the State cannot deny that under the circumstances of this case there is actual or implied duress or coercion. And the case law further is that coercion is implicit in situations where consent is obtained under color of a badge. And this is a Federal case, and they say that the Government must show that there was no coercion. In fact, the Government's burden is greater where consent is claimed to have been given in this case while the Defendant is under arrest; in our case while he was in custody, and I respectfully submit, under arrest because a detention is an arrest. It is not necessary to tell an individual "You are under arrest." A detention is under arrest.

The threshold issue in this case and everything that followed after it would be contaminated by what occurred when they

took away his airline ticket and asked him to accompany them into a police office. He was detained. He was under arrest as well as if he had been handcuffed. He knew he couldn't leave; he didn't leave.

I respectfully submit that that is violative of his Fourth Amendment Rights.

THE COURT: Anything further?

MR. McMASTER: Yes, Judge.

Just one more thing: Most respectfully, I believe that the law was incorrectly stated to Your Honor. I would like to clear it up.

First of all, the point Mr.Block makes regarding the free and voluntary knowing and intelligent waiver of the Defendant's Right does not apply on consent searches under the Fourth Amendment. The State would cite to Your Honor that the United States Supreme Court case of Schneckloth versus Bustamonte, wherein

that particular issue was brought directly upon the Court in a very long dissertation regarding the weight to be given the Rights under the Fourth Amendment as opposed to the Rights that would guarantee a fair trial at the time of trial, are completely different. They specifically held that the standard for a waiver on consent, Judge, is free and voluntary. It specifically held that it was not a knowing and intelligent waiver because otherwise the Defendant could come into Court and say, "They never advised me of my Rights, therefore it was not intelligent when I gave consent." And it would completely frustrate the purpose of it.

Not only would I cite Schneckloth, I would cite Florida Supreme Court, 1975, Bailey v. State, Third District, MacLemrock [phonetic] v. State, Second and Foruth District cases in addition to

numerous Federal decisions indicating that the State is not required--that he has the right to refuse consent. They are unanimous in their holding about that, Judge.

I state or I submit to the Court that under the circumstances of this case, the Defendant freely and voluntarily waived his Rights and consented to the search.

THE COURT: Anything further?

MR. BLOCK: Just the one sentence conclusion. It cannot be any free and voluntary consent when they take his ticket away from him and take him into a police office for interrogation.

THE COURT: Anything further?

MR. BLOCK: No, Your Honor.

MR. MCMASTER: Nothing, Judge.

THE COURT: Motion to suppress be in the same is hereby denied.

We are dealing with an unusual circumstance. Profile searches, as they have been called, I believe, is something new. But then at the time the Carroll [phonetic] decision, the search of an automobile and the manner in which it took place, was something new. What is reasonable in one circumstance may not be reasonable in another circumstance.

Number one, the Court's ruling, on denying the motion to suppress, is that the Court believes that the consent was freely and voluntarily given. By the same token, I think under circumstances such as this where the police officers are in an airport and are surveilling, as testified to by the officer, with a specific profile that they are following, that the officer doesn't have the time to run out and get a search warrant because the plane is going to take off. If there is

going to be anything occurring, it's going to occur long before they can take any type of action. So it's a denial on dual grounds. Might as well get it tested whether it's reasonable or unreasonable because, I assume you are taking an appeal?

MR. BLOCK: I don't think the young man can afford an appeal.

THE COURT: That can easily be solved.

MR. BLOCK: If Your Honor please, the tate and us have entered into some plea negotiations with reference to this matter, and we would--our negotiations are as follows: The Defendant would enter a plea of nolo. The next part we had not discussed. I would like under the new Rules to research it.

THE COURT: Oh, yes.

MR. BLOCK: To the Defendant's right to question this issue on appeal

[R8]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO.78-200(morphonios)

THE STATE OF FLORIDA,)
Plaintiff)
vs.) NOTICE OF APPEAL
MARK ROYER,)
Defendant.)
)

NOTICE IS HEREBY GIVEN that the Defendant appeals to the District Court of Appeal, Third District of Florida, the Order of this Court entered the 22 day of May, 1978.

The nature of the Order appealed from is a Final Judgment and Sentence entered after a plea of nolo contendere, specifically reserving all search and seizure

questions would be dispositive of the entire case.

Respectfully submitted,

MARK ROYER

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished, by mail, to the Sate Attorney, 1351 N.W. 12th Street, Miami, Florida and the Attorney General, 8585 Sunset Drive, Miami, Florida this 23 day of MAY, 1978.

MARK ROYER

80-2146

Office-Supreme Court, U.S.
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CLERK

IN THE

SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1980

THE STATE OF FLORIDA,

Petitioner,

v.

MARK ROYER,

Respondent.

RESPONDENT'S REPLY BRIEF ON JURISDICTION

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QUESTION PRESENTED

The Respondent believes that the phraseology of the question presented by the Petitioner inaccurately depicts the holding of the unanimous en banc Florida District Court of Appeal decision. Based upon the decision appealed from, Respondent submits that the following question is the proper one presented to this Court by the decision the Petitioner seeks to have reviewed:

> WHETHER THE DECISION OF A UNANIMOUS EN BANC FLORIDA APPELLATE COURT IS A MISAPPLICATION OF THE FOURTH AMENDMENT WHERE THE COURT SUPPRESSED CONTRABAND SEIZED BY NARCOTICS' OFFICERS BASED ON THE FOLLOWING FINDINGS:
>
> > 1) DEFENDANT WAS "IN CUSTODY" IN ABSENCE OF PROBABLE CAUSE WHERE HE A) ACCOMPANIED TWO AIRPORT NARCOTICS OFFICERS TO SMALL OFFICE, B) WAS INFORMED HE WAS SUSPECTED OF TRANSPORTING NARCOTICS, C) HIS AIRLINE TICKET AND LUGGAGE WERE TAKEN FROM HIM BY THE OFFICERS.
> >
> > 2) "DRUG COURIER PROFILE" USED BY NARCOTICS OFFICERS MAY POSSIBLY SUBJECT DEFENDANT TO INVESTIGATORY ("TERRY") STOP BUT DOES NOT CONSTITUTE PROBABLE CAUSE TO ARREST OR CONFINE DEFENDANT.
> >
> > 3) DEFENDANT'S CONSENT GIVEN AFTER UNLAWFUL CONFINEMENT WAS INVOLUNTARY AND INVALID.

4) EXIGENT CIRCUMSTANCES SERVE TO "EXCUSE" SEARCH WARRANT BUT DO NOT TAKE PLACE OF PROBABLE CAUSE.

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OPINIONS BELOW

The District Court of Appeal of Florida, Third District filed a unanimous en banc decision on September 9, 1980 [reported at 389 So.2d 1007 (Fla. 3d DCA 1980)] reversing the trial court's denial of Defendant's Motion to Suppress and reversing a split Florida District Court panel opinion which had affirmed the trial court. The opinion of the Florida District Court of Appeal is not contained in Petitioner's Appendix. Respondent's counsel has, however, been informed by Petitioner's counsel that the Supreme Court record will be supplemented with this opinion.

The Florida Supreme Court denied the State's application for review.

JURISDICTION

The opinion of the Florida Appellate Court is consistent with the Fourth Amendment to the Constitution of the United States and applicable interpretive case law decided by the United States Supreme Court. Contrary to the Petitioner's contentions, a fair reading of the unanimous en banc decision of the Florida Appellate Court demonstrates that the principals of law it sets forth are consistent with the Fourth Amendment and United States Supreme Court decisions including United States v. Mendenhall, 446 U.S. 544 (1980); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); and Terry v. Ohio, 392 U.S. 1 (1968). The Royer case does not involve any substantial federal question not before determined by the Supreme Court.

As a result, the Respondent does not believe that this Court has jurisdiction to

consider this case by granting certiorari as the Petitioner requests. The Royer case is a lengthy and well-reasoned opinion which has clarified the law in this area of the country and has set forth usable guidelines for the interpretation of these issues by trial judges. Recently, the United States Supreme Court unanimously refused to review another Florida case, Florida v. Stewart, U.S. Sup. Ct. Case No. 80-1319, cert. denied June 22, 1981 which presented some of the same issues urged by the Petitioner in the instant case.

Further, it is clear that a state can employ a more stringent interpretation of the Fourth Amendment than does the federal government. Therefore, even if the Royer case holds the State of Florida to a stricter interpretation of the Fourth Amendment than does the federal government, Royer is not subject to reversal on this premise.

Royer does not decide a federal question in a manner inconsistent with applicable United States Supreme Court decisions nor does it involve a federal question not previously determined by the Supreme Court. As a result, there is no jurisdiction for review by this Court.

STATEMENT OF THE CASE

A. Comment on Petitioner's Statement of the Case.

Petitioner's Statement of the Case frequently quotes from the split Florida appellate decision which was later reversed unanimously by the same appellate court sitting en banc. Respondent submits that this rendition of the facts is inaccurate both in its categorization of the operative facts and in its categorization of the Defendant's legal position; e.g.:

> . . . . the Defendant. . . contends the court's finding of consent was error because he was not told he could refuse consent, and that because such consents were given to police officers as a matter of law it could not be held that his consents were free and voluntary. (Petitioner's brief p. 11 quoting from split panel opinion 389 So.2d at 1009.)

Such a statement is totally and completely inaccurate since nowhere in Defendant's briefs nor at oral argument did the Defendant claim error because (a) the Defendant was not informed of his right to refuse consent or (b) because consents made to police officers are involuntary as a matter of law. Defendant acknowledges that police officers have no constitutional duty to inform the Defendant of his right to refuse consent. Whether or not an individual has been informed of his right to refuse consent is only one factor to be considered in the Schneckloth "totality of the circumstances test." However, since Royer was not so informed, this does reflect upon the issue of consent, although it is not determinative of it.

B. Respondent's Statement of the Case.

With citations to the record of the appellate court, the following is a statement of the relevant facts below:

Public Safety Department Officers Johnson and Magdalena were assigned to Miami International Airport on January 3, 1978 and sometime between 12:00 and 12:30 p.m., they encountered the Defendant Mark Royer. (R. 12.) Although neither officer had received any prior information linking Royer to criminal activity, their suspicions were aroused by certain observations. (R. 14.) Officer Johnson testified that he and Magdalena were watching Royer carefully and suspected him of drug trafficking due to his age, nervousness, his two American Tourister suitcases, and the fact that he was looking around continually and watching his bags carefully. (R. 13-19.) Another factor deemed significant by the policemen in regard to Royer's actions is that he paid for his airline ticket in cash. (R. 19, 20.)

After Royer bought his ticket, he was given two stick-on adhesive labels for his baggage which had the name "Holt" written on each. (R. 21, 22.) As Mr. Royer left the ticket counter and proceeded to the departure gate for National Airlines, he was stopped by Officers Johnson and Magdalena. (R. 22, 23.) The policemen identified themselves and showed Royer their badges and identification cards. (R. 23.) Johnson asked Royer to show him his airline ticket and identification. (R. 24.) After giving the policeman his airline ticket, it was never returned or offered back to Royer until after the subsequent search occurred. (R. 44, 46, 53.) Mr. Royer produced a New Jersey driver's license in the name of Mark Royer and explained that a friend had made reservations for him in the name of "Holt." (R. 24, 25.)

The officers told Mr. Royer that they were narcotics investigators and that they had reason to suspect that he was transporting narcotics. (R. 26, 45.) The policemen had Royer accompany them to an interrogation room some forty feet from the point of their encounter. (R. 26, 27.) The room was actually no more than a converted closet fitted with a small desk and two chairs. (R. 27.) Mr. Royer testified that on the way to the room one officer said that the policemen had been waiting for him all morning and wanted to know how much pot was in the bags. Royer was told that he was crazy to try to do this since there were always guards around. (R. 56.) The police did not refute Mr. Royer's testimony.

After Royer reached the police room, Magdalena remained with him as Johnson tore off the baggage stubs from Royer's ticket

and without permission from Royer, went downstairs to get the bags. (R. 41, 42, 45, 46, 55.) No Miranda warnings had been given nor had the Defendant formally been placed under arrest at this point. (R. 43, 44.) After Johnson returned with the suitcases, of which he took possession without requesting the Defendant's consent, he joined Royer and Magdalena in the interrogation room. (R. 45.)

Mr. Royer testified that he was asked to empty his pockets and that among the items he took from his pockets was a luggage key. (R. 57.) Officer Johnson stated that upon entering the police room, Royer was asked if he would give consent to a search of his suitcases so that the policemen could confirm their suspicions that he was carrying narcotics. (R. 28.) Royer stated that consent was never specifically asked for and that after he

was told to unlock one suitcase and did so, one of the officers opened it. (R. 57, 58.) There is undisputed testimony to the effect that Mr. Royer was never told he had a right to disobey the requests of the policemen or that he had a right to leave or refuse to allow the search. (R. 40, 45, 47, 57, 58.) Royer testified that he did not believe he was free to leave at any time during this encounter. (R. 54, 56, 57.)

Officer Johnson stated that in response to his request for consent, Royer did not say anything. (R. 29.) Royer silently produced the key to the white suitcase which was subsequently opened by officer Johnson. (R. 29.) The second suitcase, the gray one, had a combination lock which Royer was unable to open. (R. 29.) After Johnson obtained a screwdriver, the gray suitcase was pried open with no apparent

objection from Mr. Royer. (R. 29, 30.) After viewing the contents of the suitcases, Royer was placed under arrest and read his Miranda rights. (R. 33.)

ARGUMENT

The unanimous en banc Florida Appellate Court used a three-step analysis of the facts involved in this case in order to reverse the denial of Defendant's Motion to Suppress and in order to reject the State's primary argument for affirmance, that Royer effectively and validly consented to the opening of his suitcases. This analysis demonstrates that the Florida Appellate Court relied upon fundamental and sound principles of law consistent with the Fourth Amendment and all United States Supreme Court cases dealing with similar issues.

1) Royer involuntarily confined. It is clear from the facts presented to the trial judge that the actions of the officers, who took and never returned the Defendant's ticket and baggage, constituted a "detention," "confinement," or "arrest" of

the Defendant. Other factors also contributed to the conclusion that an arrest had in fact occurred. Royer was confronted in an airport and told that he was speaking with narcotics officers who "had reason to suspect he was transporting narcotics." (R. 26.) Therefore, the investigation was focused on an individual. The officers then took the Defendant's ticket and baggage stubs and retrieved his luggage for him. (R. 41, 42.) The ticket and luggage were never returned nor offered to him. (R. 44, 46, 53.) The Defendant was asked to go to an interrogation room and on the way to the room, one of the officers told Royer that they had been waiting all morning for him and asked how much pot was in the bags. (R. 56.) Mr. Royer testified that he did not believe he could leave at this point. (R. 54, 56, 57.) There is little question

that a reasonable person would not believe he was free to walk away from the narcotics officers under these circumstances. Therefore, an arrest occurred.

2) No probable cause. Royer was detained or arrested without probable cause at the time the alleged consent was given. The only basis for the detention of the Defendant was a mere similarity with some of the contents of a drug courier profile. The Appellate Court held, in accordance with state and federal case law, that conformity with a drug courier profile does not constitute probable cause sufficient to arrest the Defendant. In fact, in this case the arresting officer unequivocally admitted in the trial court that no probable cause existed prior to the actual discovery of the contents of the baggage. (R. 36.)

As dicta, the court also stated that the drug courier profile is insufficient even to constitute an articulable suspicion required to justify a Terry stop. In this regard only, the Florida Appellate Court stated that the Mendenhall case appeared to be contra. However, it must be noted that the Royer court held that Royer had been detained and not merely stopped in a Terry context. As a result, the Royer case merely reiterates a fundamental principal of criminal law, i.e. an individual cannot be detained without probable cause. The decision then states, in conformity with state and federal law throughout the United States, that probable cause does not arise by similarity with a drug courier profile

alone.* In this way, the Royer case is consistent, or at least not inconsistent, with the Mendenhall case and with the case of Reid v. Georgia, 65 L.Ed. 2d 890 (1980).

3) Consent tainted and invalid. The court went on to hold that since Royer had been unlawfully confined, the law of Florida directs that any subsequent consent is presumptively tainted and rendered

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*During the course of oral argument before the en banc court, Petitioner's counsel was challenged by the court to cite a single case, state or federal, which holds that merely the exhibition of certain drug courier profile characteristics amounts to probable cause subjecting an individual to arrest. Petitioner's counsel could not so cite the court then and even now cites no authority in support of such a position.

involuntary. The consent would only be held voluntary if there was a clear and convincing proof of an unequivocal break in the chain of illegality sufficient to dissipate the taint of prior illegal action. The court finding no such proof, held that Royer's consent must be deemed involuntary and invalid as a matter of law.

Finally, the court held that the State's claim of "exigent circumstances" would at most excuse the officers from obtaining a warrant. However, exigent circumstances do not take the place of probable cause necessary to arrest an individual or sustain any search. Therefore, the presence or absence of exigent circumstances is irrelevant to the actual issues decided by the appellate court.

This court found in Mendenhall that the Fourth Amendment had not been violated by the stopping of the Defendant, but at no time did the court hold that similarity to the "drug courier profile" constituted probable cause to arrest the Defendant. In the Royer case, the appellate court specifically determined that Royer had been arrested, not merely stopped.

The majority opinion in Mendenhall clearly based its decision on the specific facts of that case. Some of these facts, absent in the Royer case, include the fact that the Defendant in Mendenhall had her plane ticket and driver's license returned to her prior to the time she was asked to go to an office. Justice Rehnquist stated that their was no "objective reason" to believe that the Defendant in Mendenhall was not free to proceed on her way.

However, in the Royer case the Defendant's ticket and luggage were never returned nor offered to him. In addition, Royer had specifically been told that the officers "had reason to suspect he was transporting narcotics." (R. 26.) Therefore, there is little question that Royer had an objective basis for his belief that he was not free to go. Royer testified to this effect in the trial court. (R. 54, 56, 57.)

Therefore, Royer and Mendenhall, although factually distinguishable, consider similar issues of law and present conclusions of law which are consistent. Although the Royer case makes a passing comment that the drug courier profile is insufficient for purposes of a Terry stop, this particular legal issue was unnecessary in reaching the conclusion that Royer was illegally arrested by the narcotics officers.

CONCLUSION

Although the Petitioner thoroughly confuses the relatively simple issues considered by the Florida Appellate Court, it is clear that the Royer case presents facts and conclusions of law which are consistent with the Fourth Amendment and interpretive case law rendered by the United States Supreme Court. Simply put, the en banc unanimous decision of the Florida Appellate Court found that the actions of the narcotics officers amounted to an arrest of the Defendant. The only basis for the actions of the officers was that the Defendant met certain characteristics of the drug courier profile which the court determined did not constitute probable cause to arrest the Defendant. As a matter of fact, the arresting officer unequivocally admitted

that he had no probable cause prior to the actual discovery of the contents of the baggage. (R. 36.) Having arrested Royer without probable cause, his alleged consent was presumptively tainted and involuntary.

The above conclusions of law are basic, sound principles consistent with every United States Supreme Court case on this issue and consistent with nearly all major state and federal cases dealing with such a situation. As a result, there is no basis for this court to grant certiorari to the Petitioner.

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NO. 80-2146

in the Supreme Court of the United States

October Term, 1980

THE STATE OF FLORIDA,

Petitioner,

vs.

MARK ROYER,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Florida

BRIEF OF PETITIONER

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QUESTION PRESENTED

WHETHER THE DECISION OF THE FLORIDA COURTS, CONSTRUING THE FOURTH AMENDMENT AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, HOLDING: 1) THAT THE MERE APPROACH AND CONVERSATION OF A POLICE OFFICER IS A DETENTION/STOP; 2) THAT THE FACTS HEREIN CONSTITUTE A STOP AND ARREST 3) THAT ALL SO-CALLED "PROFILE TRANSACTIONS ARE ILLEGAL NO MATTER WHAT THE FACTS ARE, UNDER *REID V. GEORGIA*, ___ U.S. ___, 100 S.CT. 2752 (1980) and 4) THAT THE CONSENT AND SEARCH HEREIN WAS THEREFORE ILLEGAL, IS IN DIRECT AND SUBSTANTIAL CONFLICT WITH THE RULE OF THIS COURT IN *UNITED STATES V. MENDENHALL*, ___ U.S. ___, 100 S.CT. 1870 (1980); *SCHNECKLOTH V. BUSTAMONTE*, 412 U.S. 218 (1973) AND *TERRY V. OHIO*, 392 U.S. 1 (1968) AND IS A MISAPPLICATION OF THE FOURTH AMENDMENT?

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PREFACE

The Petitioner, THE STATE OF FLORIDA, was the Petitioner in the Supreme Court of Florida, the Appellee in the District Court of Appeal of Florida, Third District, and prosecution in the Florida trial court. The Respondent in the Supreme Court of Florida, the Appellant in the District Court and the Defendant in the trial court. In this brief, the parties will be referred to as they appeared in the Florida trial court below.

The following references are made in this brief:

(R) For the Record-on-Appeal transmitted under separate cover.

(T) For the transcript of proceedings transmitted under separate cover.

(A) For the joint appendix submitted herewith.

(PA) For the Appendix to the Petitioner's brief submitted herewith.

Substantial preliminary assistance to the undersigned in the research for this brief was submitted by E. M. Edson of the office of the Chief Counsel for the Drug Enforcement Administration.

I

OPINIONS BELOW

The opinion of the District Court of Florida, Third District, *en banc*, reversing the Florida trial court's denial of the Defendant's Motion to Suppress and reversing the Florida District Court panel opinion reported therein, is reported at *Royer v. State*, 389 So.2d 1007 (Fla. 3d DCA 1980). The opinion of the Florida Supreme Court denying the State's Application for review (Adkins and Alderman, JJ. *dissenting*), is reported at *State v. Royer*, 397 So.2d 779 (Fla. 1981). There are no official reporters for citation to these opinions.

II

JURISDICTION

On March 19, 1981, the Supreme Court of Florida with two Justices dissenting denied the State's timely application for review. On May 19, 1981, this Honorable Court (by Justice Powell) extended the time for filing the present petition up to and including June 16, 1981. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, §1257(3) and Amendments IV and XIV of the United States Constitution.

The interpretation of the Florida Constitution and the United States Constitution are identical for purposes of the application of the criminal law and search and seizure issues. *Hetland v. State*, 366 So.2d 831 (Fla. 2d DCA 1979) *approved and adopted, Hetland v. State*, 387 So.2d 963 (Fla. 1980). *See, also* §933.19 Fla. Stat. [adopting *Carroll v. United States*, 267 U.S. 132 (1925)]. The constitutional issues herein were presented and fully argued at all levels of the proceedings below.

III

CONSTITUTION AND STATUTORY PROVISIONS

Amendment IV of the Constitution of the United States provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV of the Constitution of the United States provided that:

> "All persons born naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

IV

STATEMENT OF THE CASE

The Defendant, MARK ROYER, was charged by information with unlawful possession of marijuana and possession of marijuana with intent to sell, arising out of his

attempt to transport sixty-five (65) pounds of marijuana in his luggage through the Miami International Airport on January 3, 1978. R1-R2. The Defendant filed a Motion to Suppress the marijuana, which the trial court denied after a hearing. The trial court denied the Defendant's Motion to Suppress upon two alternative grounds: 1) that the Defendant voluntarily consented to the search of his baggage and 2) that the actions by the officers were constitutionally reasonable based upon the facts, which they observed considered together with their experience and training and the exigencies of the situation. *See*, 115A-116A.

At the hearing upon the Motion to Suppress, the State produced one witness, Detective William Johnson, of the Dade County Public Safety Department. 16A-17A. Detective Johnson testified that he was on duty at the Miami International Airport on January 3, 1978, observing persons purchasing tickets and meeting flights from "target" cities. 18A. Detective Johnson testified that Miami is a high source city for cocaine and marijuana. 19A. Johnson said his job is to intercept narcotics entering interstate commerce leaving Miami International Airport. 57A-58A. Johnson said that he is trained in the DEA drug courier profiles and works at the airport observing passengers eight (8) hours a day and five (5) days a week. 20A. He testified that a DEA drug courier profile was developed based upon actual case studies and that the airport narcotics unit has developed a similar profile for Miami International Airport based upon the Detectives' experience. 28A-29A. Johnson testified that the touchstones of a profile generally consist of 1) casually dress; 2) twenty-five to thirty-five years old; 3) one way ticket; 4) paying for ticket in *cash* only; 5) using no identification; 6) using no other means of identification such as credit cards or checks; 7) traveling to a "target" city; 8) carrying American Tourister luggage; 9) placing false identification on the luggage labels required by federal airline regulations and 10) carrying large amounts of cash. 28A-29A; 36A-39A. Detective Johnson testified that *cash only* and the lack of identification is

central to the couriers efforts to avoid detection and to avoid detection by traveling under an alias. 36A. Detective Johnson testified that the failure of a passenger to properly identify himself and his luggage is a violation of the airline regulations governing air travel. 38A. He also, testified that he maintains constant contact with police departments in major cities and the Federal Drug Enforcement Administration concerning drug couriers and their activity. 21A-23A. Johnson said that he has worked closely with the Los Angeles and Detroit DEA units and in particular Paul Marconi in developing Miami's profile. 21A-22A.

On January 3, 1978, at about noon, Detective Johnson observed the Defendant at the National Airlines ticket counter at Miami International Airport. 25A-27A. *Johnson testified without objection that in the Detectives' training and experience the Defendant's appearance and demeanor attracted his attention and the attention of Detective Magdelena.* 27A-28A. The Defendant was extremely nervous uneasy, pale and appeared to be looking about to see if anyone was watching him. 29A-30A. Detective Johnson testified that in his experience of observing passengers eight (8) hours a day and thousands over a period of six months, that the Defendant's agitation was clearly centered on being detected rather than that he was just a "white knuckle" flyer. 30A-32A. Detective Johnson testified, that the Defendant was carrying two (2) American Tourister bags one of which was brand new. 27A. The bags were very heavy and the Defendant produced an extremely large roll of cash to pay for his ticket from his front pocket. 33A-35A. Johnson said that they observed that the Defendant was given luggage labels *required by airline regulations* and the Defendant wrote the name, *"Holt"* and "La Guardia" on the identification labels. 37A-38A. Detectives Johnson and Magdelena approached the Defendant identified themselves as police officers and asked the Defendant if he had a moment to talk and the Defendant replied "yes" that he did. 40A-41A. Detective Johnson indicated that in his experience and training

when somebody they approach refuses to talk for a moment, they just get on the plane and leave. 73A.

The Defendant upon request produced his driver's license from New Jersey and his plane ticket.[1] 41A-42A. The Detectives immediately noted the discrepancy in names between the Defendant's name and address and that which he had given the airline for his ticket and bag. 42A-43A; 81A. The Detectives inquired as to the discrepancy and the Defendant said that he had not made the reservation. 43A. Johnson testified that he told the Defendant that they suspected he was transporting narcotics. T26-T27. Johnson said, that they then asked the Defendant if he would accompany them to a room a few feet away for further discussion. 44A-45A. Johnson testified that the detectives asked the Defendant if he would accompany them and he did. 68A. Johnson testified that the Defendant was very cooperative. 72A-73A.

The room involved is adjacent to and part of the Air Florida Stewardess lounge at Miami International Airport. 45A. Johnson testified that they wanted to continue the discussion out of the crowded general airport concourse to avoid possible embarrassment to the Defendant and to protect the public from possible violence. 51A-52A. The detectives were courteous at all times; they did not threaten the Defendant in any way; the entire transaction took only a few minutes; the transaction was purely conversational in tone; the Defendant indicated that he understood all that was said and there was no physical contact with the Defendant at any time. 52A-56A.

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[1]The Officers apparently retained the Defendant's plane ticket for the baggage information in the absence of a request for its return. *See*, 68A. The ticket was however, left in the office with the Defendant, when Detective Johnson retrieved the Defendant's bags. 71A. The Defendant however, evidently retained his license since he indicated that it was with the other matters from his pockets. *See*, 87A.

Johnson said that in the room, *which was about forty (40) feet away,* they ask the Defendant if they could have his consent to open the suitcases that he had been carrying. 47A. *They again said,* that they suspected him of transporting narcotics.[2] 47A. Johnson indicated in his testimony that if the Defendant had refused, the detectives would have sought a search warrant.[3] *See,* 56A. In response, the Defendant produced a key and unlocked the white suitcase he was carrying and said that he didn't know the combination to the other bag, but that they could "go ahead" and open it if they wanted to. 47A. The bags were opened and contained sixty-five (65) pounds of marijuana. *See,* 53A. Johnson said that the Defendant *never* indicated he *did not* want to cooperate. 72A-73A. The entire transaction took about ten (10) to fifteen (15) minutes. 50A. After being read his Miranda rights and indicating that he understood, the Defendant agreed to and talked without an attorney. 54A. On cross-examination Counsel for the Defendant sought to attack Johnson's integrity by saying that Johnson is not interested in whether his arrests are valid or not. 58A.

The Defendant, a twenty-two (22) year old, college educated, adult male, with a four year degree in Communications, (*see,* 55A; 88A). said that the detectives had approached the Defendant and *asked* if they could talk with him. 78A-79A. The Defendant also said, that he produced his ticket *voluntarily* and then his identification. 78A-79A.

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[2]Johnson indicated in subsequent testimony that he asked the Defendant for consent to open the suitcases and after the conversation with the Defendant, Johnson went and got the bags. *See,* 74A; 46A-48A.

[3]Intrinsic here must be the potential for any cumulative information that the detectives could also have obtained from a narcotic dog or *further* investigation of the facts known as for example in a "call-back" number and the alias "Holt." *See, e.g. Mata v. State,* 380 So.2d 1157 (Fla. 3d DCA 1980); *Sizemore v. State,* 390 So.2d 401 (Fla. 3d DCA 1980).

He testified that the officers had noted the discrepancy between his identification and the name that he gave the airline. 81A. However, the Defendant's story as presented to the trial judge was that the detectives never asked him for his consent to open his bag. 94A. He said, that he was *told* to come with them to the room. 81A. He said that once in the room they *told* him to empty his pockets and to open his suitcase. 85A-86A. The Defendant said that he didn't leave because he was afraid of getting hurt by the officers. 86A. However, he then later said that the officers were courteous. 90A. The Defendant refused to testify as to who he claims made the airline reservation and refused to testify as to whether "Holt" exists or not. *See*, 90A-91A. The Defendant offered no explanation for, why if the Detectives had demanded that he empty his pockets, they then asked *him* to open the suitcase with the key. *See*, 94A-95A. *The Defendant affirmatively testified however, that in the room, he was not under arrest.* 84A.

The trial Court below, having heard all the witnesses and evidence before it and viewing the demeanor of Detective Johnson and the Defendant and having to resolve the conflicts in the evidence, *rejected* the Defendant's testimony, which conflicted and found, as a matter of fact, that the Defendant had consented to the *entire* transaction. 114A-115A. The Court further found that the situation was *exigent;* the Detectives had no time to get a warrant to search the luggage because in a few minutes the Defendant would be gone and it was constitutionally reasonable for the detectives to approach the Defendant, inquire and search the luggage. *See*, 115A-116A.

After accepting briefs of the parties and hearing oral argument, on December 28, 1979, the original panel herein *affirmed* the Defendant's conviction. The panel opinion held, 1) that there is no requirement in the law that the Defendant be advised of his right to refuse consent; 2) that voluntary conversation with police officers is without constitutional

impact; 3) that in the totality of the circumstances the trial court could have found voluntary consent; 4) that *Taylor v. State*, 355 So.2d 180 (Fla. 3d DCA 1978), is distinguishable because in that circumstance, the officers had overtly coerced the consent by beginning the same search that they were requesting; 5) submitted that its holding is inconsistent with *State v. Frost*, 374 So.2d 593 (Fla. 3d DCA 1979); 6) citing *inter alia*, *Carroll v. United States*, 267 U.S. 132 (1966) and *United States v. Chadwick*, 433 U.S. 1, (1977), held that an arrest and detention of the Defendant was proper, where in the Detectives experience he *was* a drug courier and 7) that the trial court's alternative holding that a search of the Defendant's luggage was constitutionally reasonable is supported by the record and lawfully correct. *See*, 389 So.2d at 1009-1015.

The dissent to the panel decision would have reversed the trial court because, a) the Defendant was "arrested," when he was asked to go to the "police room" (citing *Frost, supra*); b) the Defendant's arrest was unlawful because even if the Detectives had articulable suspicion, they did not have probable cause; c) the Defendant's consent was given while unlawfully detained (citing *Frost*) and therefore, his consent was presumptively "tainted" irrespective of the circumstances, because he was not warned of his right to refuse as in *Husted v. State*, 370 So.2d 853 (Fla. 3d DCA 1979) and [required] by *Taylor v. State, supra. Id* 1014-1015.

A petition for rehearing *en banc* was requested by the *dissent* upon a petition by the Defendant. *Id* at 1015. The petition was granted; extensive briefs of the parties were submitted and oral argument was subsequently heard on April 14, 1980. On September 9, 1980, in a split opinion, the District Court *reversed* the panel opinion *and* the trial court.

The fundamental error in the *en banc* court opinion, which authored by the dissent to the panel opinion, is reflected

in its view of the *factual questions* of *consent* found by the trial court and *affirmed* by the *panel opinion*. *The en banc court opinion refers to the factual finding of consent by the trial court as "THE ALLEGED CONSENT." Id* at 1019. Citing *Frost, supra*, the *en banc* opinion then takes the view that *any movement* from the airport concourse to the room forty (40) feet away under *Dunaway v. New York*, 442 U.S. 200 (1979) was an *arrest*. *Id* at 1018-1019. The Court then ignores any possibility of a brief detention of the Defendant for investigation. The Court states that the alias used by the Defendant was *not* a suspicious circumstance in the experience of the Court and rejected Detective Johnson's training, experience and actual observations of the Defendant as "amateur psychiatry" to be, "totally disregarded"[4]. *Id*, at 1016 n. 4; 1019 n. 11.

The *en banc* court then takes the position that *Reid v. Georgia*, ____ U.S. ____, 100 S.Ct. 2752 (1980) precludes all stops based upon all profiles and states further that *United States v. Mendenhall*, ____ U.S. ____, 100 S.Ct. 1870 (1980) is *"contra."* *Id*, at 1019 and 1017 n. 6. The Court concluded without viewing the facts reached by the trial court as sustained by the panel, that because the Defendant was illegally detained, his consent was therefore, automatically invalid. *Id* at 1018. The court stated that there was no precedent to sustain the trial court. *But see, e.g., United States v. Mendenhall, supra*. On October 21, 1980, the State's Motion for Rehearing and certification was denied. On March

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[4]As noted above however, Detective Johnson, was *accepted* by the trial court as an experienced airport courier/narcotics officer and he testified that *cash only* and the lack of identification is *central* to the couriers' efforts to avoid detection and to avoid detection by traveling under an alias. Johnson also testified that the Defendant was extremely nervous, unease, pale and appeared to be looking about to see if anyone was watching him. Johnson testified that in his experience of observing passengers eight (8) hours a day and thousands over a period of six months, that the Defendant's agitation was clearly centered on being *detected* rather than that he was a "white knuckle" flyer.

18, 1981, the Florida Supreme Court, with Justices Alderman and Adkins dissenting, denied the State's application for review of the Florida District Court's *en banc* decision. *State v. Royer*, 397 So.2d 779 (Fla. 1981).

V

SUMMARY OF ARGUMENT

The exclusionary rule should not be applied in the circumstances of the case at bar, where the officers acted in good faith and the application of the exclusionary rule serves no purpose except to frustrate the lawful and good faith interdiction of *chronic* narcotics traffic. *See, United States v. Williams*, 622 F.2d 830 (5th Cir. 1980) (*en banc*), *cert. den.*, 449 U.S. 1127 (1981).

The mere approach of police officers and engaging the Defendant in conversation is not prohibited by the Fourth Amendment.

Where there is no restraint placed upon the Defendant's right to walk away, there is neither a "stop" nor "detention" within the meaning of the constitution, even though the inquiry may be investigative in nature. *See, United States v. Mendenhall*, ____ U.S. ____, 100 S.Ct. 1870 (1980). The Fourth Amendment does not require that a policeman who lacks the precise level of information for probable cause to simply shrug his shoulders and allow a crime to occur or a criminal to escape. *See, Adams v. Williams*, 407 U.S. 143 (1972).

There is substantial competent evidence, which the trial court chose to believe, that the Defendant freely and voluntarily consented to speak with the officers; to permit an examination of his ticket and license; to reconvene in an adjacent room and to the examination of his luggage. The

District Court as an Appellate Court was therefore mistaken in substituting its view of the facts, for that of the trial court. *See, United States v. Mendenhall, supra; Schneckloth v. Bustamonte,* 412 U.S. 218 (1973).

Consistent with traditional analysis, Detectives Johnson and Magdelena had articulable suspicion for a brief detention of the Defendant for further investigation and/or probable cause to believe that the Defendant was attempting to transport illicit narcotics through Miami International Airport. *See, United States v. Mendenhall; Brinegar v. United States,* 388 U.S. 160 (1947); *see, also, United States v. Cortez,* ____ U.S.____, 101 S.Ct. 690 (1981); *Draper v. United States,* 358 U.S. 307 (1959).

Any detention of the Defendant for further investigation did *not* rise to an arrest because of limited movement to a room forty (40) feet away. The movement to the room did not become an arrest, where danger to the public in a crowded airport and avoiding possible embarrassment to the Defendant are among legitimate law enforcement concerns and where the transaction lacks any traditional indicia of an arrest *and* the Defendant subjectively stated that he was *not* under arrest in the room. *See, Michigan v. Summers,* ____ U.S. ____, 101 S.Ct. 2587 (1981).

Any movement of the Defendant's luggage after the Defendant had given it to a third party is constitutionally irrelevant. The search of the Defendant's luggage was proper in view of the special character and nature of the airport transaction and law enforcement interest and under the exigency exception to the warrant requirement. *See, Carroll v. United States,* 267 U.S. 132 (1925).

VI

ARGUMENT

1) THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED TO NON-EGREGIOUS POLICE CONDUCT.

To extend the effect of the exclusionary rule to the present circumstance and similar causes in the future would amount to only blind imitation of the past. Even in that imitation, it is not possible that the Framers of the Constitution ever intended two hundred years later that the prohibitions of the Fourth Amendment would be extended to release airport narcotics couriers, rapists, murderers and other felons in the face of unimpeachable evidence of their criminality, which has been seized in good faith.

The rationality of the Exclusionary rule has been assailed since its inception.[1] Additionally, at least four members of

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[1]*See, e.g.*, Williams, "The Exclusionary Rule under Foreign Law-England", 52 J.Crim.L. 272 (1961); Barrett, "Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan," 43 Calif.L.Rev. 565 (1955); Burns, "Mapp v. Ohio: An All-American Mistake," 19 DePaul L.Rev. 80 (1969); Friendly, "The Bill of Rights as a Code of Criminal Procedure," 53 Calif.L.Rev. 929, 951, 952-954 (1965); F. Inbau, J. Thompson, & C. Sowle, Cases and Comments on Criminal Justice: Criminal Law Administration 1-84 (2d ed., 1968); LaFave, "Improving Police Performance Through the Exclusionary Rule" (pts 1 & 2), 30 Mo.L.Rev. 391, 566 (1965); LaFave & Remington, "Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions," 63 Mich.L.Rev. 987 (1965); N. Morris & G. Hawkins, "The Honest Politician's Guide to Crime Control, 101 (1970); Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U.Chi.L.Rev. 665 (1970); Plumb, "Illegal Enforcement of the Law," 24 Cornell L.Q. 337 (1939); Schaefer, "The Fourteenth Amendment and Sanctity of the Person," 64 Nw.U.L.Rev. 1 (1969); Waite, "Judges and the Crime Burden," 54 Mich.L.Rev. 169 (1955); Waite, "Evidence—Police Regulation by Rules of Evidence," 42 Mich.L.Rev. 679 (1944); Wigmore, "Using Evidence Obtained by Illegal Search and Seizure," 8 A.B.A.J. 479 (1922); 8 J. Wigmore, *Evidence* §2184a (McNaughton rev., 1961).

the present Court have also noted the grave defects in the rule and have urged that the rule should be substantially modified. *See, e.g., California v. Minjares*, ____ U.S. ____, 100 S.Ct. 9 (1981)(Rehnquist, J. and Burger, J., *dissenting*); Stone v. Powell, 428 U.S. 465, at 496-502 (1976) (Burger, J., concurring); *Id*, at 537-542 (White, J., *dissenting*); *Brewer v. Williams*, 430 U.S. 419, at 420-429 (1977) (Burger, J., *dissenting*); *Brown v. Illinois*, 422 U.S. 590, 610-612 (1975) (Powell, J., *concurring*). In *Irvine v. California*, 347 U.S. 128, at 136 (1954) the Court openly recognized the patent defects in the rule:

> "Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. It deprives society of its remedy against one law-breaker because he has been pursued by another. It protects one against whom incriminating evidence is discovered, but does nothing to protect innocent persons who are the victims of illegal but fruitless searches."

Although the undersigned would have great difficulty in restating the problem more thoroughly or more eloquently than the Chief Justice and Justices White, Powell and Rehnquist, the State considers that this Honorable Court should also consider the substantial message of concern and dissent from lesser courts and the rising costs of the rule to the public. Disenchantment with the seeming disarray of conflicting views upon the application of the rule and the avoidance of the truth-seeking process can be found at any level of the judicial system. In *United States v. Andrews*, 474 F.Supp. 456, at 462 (D.Colo. 1979), the learned trial judge wearily but conscientiously reviewed again the bulletins of the latest changes in the application of the rule and concluded that upon the facts before the court, the cause could have gone either way, to wit:

"This is not the appropriate case in which to consider the philosophical underpinnings, if any, of the exclusionary rule, but the "chancellor's foot veto" which was viewed with such great alarm in *United States u Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973) *seems presently to be inextricably stuck in the Serbonian bog of searches and seizures.* As the Ninth Circuit so ably demonstrated in *Fannon* and *Gummerlock, supra*, this case could have gone either way. I must admit to a feeling of considerable foolishness in each effort to determine whether a constitutionally protected zone of privacy exists in a briefcase or a cigarette package or a cardboard box. *I am tempted to pray that when I awake there will be no exclusionary rule.* I am, however, bound by my best perception of what the law presently is rather than what it may become.

"IT IS ORDERED that the defendant's motion to suppress is denied."
[Emphasis added]

Similarly, in *M.A.P. u State*, 403 So.2d 1384, 1387-1388 (Fla. 2d DCA 1981) Chief Judge Ott, in dissent found that the "Serbonian bog" of the exclusionary rule lead to an injust and intolerable result:

"This would be a wonderful world if there were no crime, no need for police officers and no such thing as a search or seizure. But there is crime, increasingly, and we hire efficient police for our protection. It isn't us against the police, but us against the criminals, and the police are but our soldiers in that war. Surely we know by now what happens when troops are committed to battle with their hands tied.

* * *

> "It is all very well to pursue pure freedom in ivory-tower meditation, and I most heartily subscribe to the proposition that individual freedom must be as pure as practicality permits, but let's not lose sight of the limiting factors imposed by the real world."
>
> *Id.* at 1387-1388.

The opinions from divergent courts in *Andrews* and *MAP* serve to illustrate the gravity of the problem. Dutiful and conscientious judges follow this Court's directives but repeatedly raise grave questions as to the admitted high and increasing price and manifest injustice of the rule. In the legal "trenches," where the rule is applied daily in cases which this Court will never hear, conscientious Courts are having increasing difficulty in applying what has become a wooden and "Draconian" rule, upon an unsuspecting public.[2] *See, Stone v. Powell*, 428 U.S. at 496-497 (Burger, J., concurring).

At the same time, it cannot be seriously disputed that illicit narcotics traffic and gambling are the very backbone of organized crime, *See, Iannelli v. United States*, 420 U.S. 770 at 786-791 (1975); *Gore v. United States*, 357 U.S. 386, at 388-393 (1958), and that the violence and corruption of narcotics traffic is tearing at the very fabric of our society.[3] *See,*

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[2]The pressure upon the courts below has only increased as the courts have become more visible and the public becomes more familiar with the role of the judiciary. *Cf, Chandler v. Florida*, ___ U.S. ___, 101 S.Ct. 802 (1981); *see, also Richmond Newspaper v. Virginia*, ___ U.S. ___, 100 S.Ct. 204 (1980).

[3]A noted real estate analyst has testified before the Senate that organized crime will soon control real estate in South Florida at the current rate of investment of narcotics monies by organized crime. *See,* PA45 "The Miami Herald," December 13, 1979 "ANALYST: DRUG CASH SENDS HOUSE PRICES HIGHER." The sociological information inherent in the Appendix to the Petitioner's brief was argued by the State below and is an essential element in weighing the issues before the court. *See,*

PA1-PA32, SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL, 95th CONG. 2d SESS., REPORT ON PROBLEMS OF LAW ENFORCEMENT AND ITS EFFORT TO REDUCE THE LEVEL OF DRUG TRAFFICKING IN SOUTH FLORIDA (Comm. Print 1978); *see, also,* PA33-PA67 (media reports of violence and corruption of drug traffic and its effects in Florida). Indeed, even in the Court below, the State's presentation drew substantial concern from a member of the Court:

> "[T]he public interest served by the temporary seizures of air travelers under discussion, particularly at the Miami International Airport, is without a doubt an immensely important one. Indeed, any fairminded person must surely conclude, in view of the overwhelming evidence available, that South Florida is being inundated with a multi-million dollar narcotic drug traffic derived in large part from sources outside the country. That traffic by any standard is corrupting this society and simultaneously bringing with it an unprecedented degree of violence and murder which is not unknown in the Great Miami area."

Royer v. State, 389 So.2d 1007, at 1023 (Fla. 3d DCA 1980) (Hubbart, J., concurring). The cost to society of releasing narcotics traffickers as in the case at bar, in the face of unimpeachable evidence of their guilt; is grieveous and grossly disproportionate to the single, theoretical benefit of the rule.

(Footnote 3 Continued)

the considerations and judicial analysis in, Brown v. Board of Education, 347 U.S. 483 (1954); *see also, Royer v. State*, 389 So.2d 1007 at 1023-1024, n5 (Fla. 3d DCA 1980) (Hubbart, J., concurring).

Undeniably, this Court created the exclusionary rule in *Weeks v. United States*, 232 U.S. 383 (1914) and *Mapp v. Ohio*, 367 U.S. 643 (1961) and therefore has the authority to repeal or modify it. The exclusionary rule is *neither* an "imperative of judicial integrity" *nor* a "constitutional requirement." *United States v. Calandra*, 414 U.S. 338 (1974); *see, also, United States v. Salvucci*, ____ U.S. ____, 100 S.Ct. 2547 (1980); *Michigan v. DeFillippo*, 443 U.S. 31 (1979); *United States v. Caceres*, 440 U.S. 741 (1979); *Rakas v. Illinois*, 439 U.S. 128 (1978); *United States v. Ceccolini*, 435 U.S. 268 (1978); *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433 (1976); *United States v. Peltier*, 422 U.S. 531 (1975); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Harris v. New York*, 401 U.S. 222 (1971). The rule is only a judicially created remedy whose sole purpose is to *deter* Fourth Amendment violations. *Calandra*, at 348. Therefore, as Judge Friendly observed, the rule may be judicially modified or repealed as the law becomes more sophisticated:

> "[T]he same authority that empowered the Court to supplement the [fourth] amendment by the exclusionary rule a hundred and twenty-five years after its adoption, likewise allows it to modify that rule as the 'lessons of experience' may teach."

Friendly, "The Bill of Rights as a Code of Criminal Procedure," 53 Calif.L.Rev. 929, 952-953 (1967); *see, also, Bivens*, 403 U.S. at 421 (Burger, J., *dissenting*). Indeed as Holmes observed, it is the *duty* of the Court to modify or repeal a rule where its purpose has become only a blind imitation of the past:

> "It is revolting to have no better reason for a rule of law than that so it was laid down in time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

Holmes, "The Path of the law," 10 Harv.L.Rev. 457, 469 (1897).

There *is* no evidence that the rule as it presently exists has any deterrent effect at all. *See, e.g., Oaks, Studying the Exclusionary Rule in Search and Seizure,* 37 U.Chi.L.Rev. 665 (1970); *Schlesinger, The Exclusionary Rule: Have Proponents Proven that it is a Deterrent to Police?* 62 Jud. 404 (1979); *Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives,* 2 J. Legal Stud. 243 (1973); *see, also, e.g., Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 368, 411-416 (1971) (Burger, J., *dissenting*); *but see, Cann and Egbert, The Exclusionary Rule: Its Necessity in Constitutional Democracy,* 23 How. L.J.299 (1980); *Limiting the Application of the Exclusionary Rule: The Good Faith Exception,* 34 Vand. L.Rev. 213, at 220 n. 51 (1981). Even the best appraisal by the proponents of the rule is that empirical data is *inconclusive* as to deterrence. *See, Cann and Egbert, supra.*

Directly applicable to our present analysis, however, the rule clearly has no deterrent effect at all where a law enforcement officer has acted in a good faith belief that his actions are constitutionally correct. In *Stone v. Powell,* 428 U.S. at 539-540, Justice White eloquently observed:

> "In most of these situations, it is hoped that the officer's judgment will be correct; but experience tells us that there will be those occasions where the trial or appellate court will disagree on the issue of probable cause, *no matter how reasonable the grounds for arrest appeared to the officer and though reasonable men could easily differ on the question.* It also happens that after the events at issue have occurred, the law may change, dramatically or ever so slightly, but in any event sufficiently to require the trial judge to hold that

there was not probable cause to make the arrest and to seize the evidence offered by the prosecution.

* * *

"In these situations, and perhaps many others, excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that in each of them the officer is acting as a reasonable officer would and should act in similar circumstances. Excluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty. It is true that in such cases the courts have ultimately determined that in their view the officer was mistaken; but it is also true that in making constitutional judgments under the general language used in some parts of our Constitution, including the Fourth Amendment, there is much room for disagreement among judges, each of whom is convinced that both he and his colleagues are reasonable men. *Surely when this Court divides five to four on issues of probable cause, it is not tenable to conclude that the officer was at fault or acted unreasonably in making the arrest.*

"*When law enforcement personnel have acted mistakenly, but in good faith and on reasonable grounds, and yet the evidence they have seized is later excluded, the exclusion can have no deterrent effect.* The officers, if they do their duty, will act in similar fashion in similar circumstances in the future; and the only consequence of the rule as presently administered is that unimpeachable and probative evidence is kept from the trier of fact and the truth-finding function of proceedings is substantially impaired or a trial totally aborted." [Emphasis added].

See, also, Stone v. Powell, 428 U.S. at 499-503 (Burger, J., *concurring*); *Brown v. Illinois*, 422 U.S. at 610-612 (Powell, J., *concurring*); *Brewer v. Williams*, 430 U.S. at 420-429 (Burger, J., *dissenting*); *Bivens*, 403 U.S. at 411-420 (Burger, J., *dissenting*); *United States v. Williams*, 622 F.2d 830, at 840-843 (5th Cir. 1980) (*en banc*), *cert. den.*, 449 U.S. 1127 (1981); *Ball, Good Faith and the Fourth Amendment: The "Reasonable Exception to the Exclusionary Rule*, 69 J.Crim.L. and Criminology 635 (1978); *C. Wright, Must the Criminal go Free if the Constable Blunders?* 50 Tex.L.R. 736 at 740 (1972). Justice White summarized his analysis with a suggestion for modification of the rule and a good faith exception:

> "The rule has been much criticized and suggestions have been made that it should be wholly abolished, but I would overrule neither *Weeks v. United States* nor *Mapp v. Ohio*. I am nevertheless of the view that the rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good faith belief that his conduct comported with existing law and having reasonable grounds for this belief."
>
> *Id*, at 538

See, also, ALI, Model Code of Pre-Arraignment Procedure §§558.02(2), (3), pp. 23-24 (Tent. Draft No. 4 1971).

In the case at bar the good faith exception as explained by Justice White is both squarely applicable and manifestly appropriate. *Where the concientious and very experienced Florida trial judge and two highly respected members of the Florida Appellate Court agreed that the officers' actions were constitutionally reasonable and correct it is totally untenable to suggest that the rule is any rational deterrent in circumstances like those in the case at bar.* This conclusion

is *manifest* in view of Detective Johnson's own response to the question of his good faith:

"Q. [By Mr. Block] All right. Now, basically, your main duty is to try to interrupt contraband from going into the airplanes and going into interstate commerce; is that not correct?

"A. Yes, sir.

"Q. And in your investigation you're mainly concerned with securing the contraband more than you are concerned with whether or not you have a proper arrest; is that not correct?

"MR. McMASTER: your Honer, I am going to object to that.

"THE COURT: Overruled.

"A. [Continuing] Absolutely not.

"Q. [By Mr. Block] Now, didn't you indicate in this case that you weren't so concerned about the arrest, but you were concerned about securing the contraband to keep it from going into commerce?

"A. No Sir. A civil lawsuit is not worth my job."

57A-59A.

See, also, 73A-74A. It is apparent that the exclusionary rule was not a deterrent to Johnson because he believed that he was lawfully performing his duty, consistent with his training and experience. What *was* a substantial deterrent however, was the possibility of a civil lawsuit. *See,* §768.28 Fla.Stat.

(waiver of sovereign immunity); *compare, Bivens*, 403 U.S. at 422-424 (Burger, J., *dissenting*).

Throughout its brief in the Court below, the undersigned vigorously argued the good faith of the officers in responding to the circumstances as they perceived them in their training and experience. *See, State Brief en banc*, pp. 38-39; 50-54; 58-72. Johnson painstakingly detailed each step in their observations of the Defendant and how their training and experience, objectively and reasonably suggested that they should act rather than shrug their shoulders and let crime and the criminal go undetected. The officers conduct with the Defendant was furthermore courteous, and conversational and in no way could be said to be egregious.

Justice White's suggestion and observations are eminently sound. This Court should adopt the good faith exception. As previously noted at least four Justices currently sitting on this Honorable Court have expressly urged that a good faith exception to the exclusionary rule as delineated by Justice White should be adopted. *See, Ball, supra*, at 635. In *United States v. Williams*, 622 F.2d 830, at 840-847 (5th Cir. 1980) (en banc), *cert. den.*, 449 U.S. 1127 (1981), thirteen judges of the Court, noting Justice White's views in *Stone v. Powell*, have expressly adopted the "good faith" exception holding:

> "Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence."

Id at 846-847.

The good faith exception also has a sound basis in the recent substantive law of this court. *See, Michigan v. DeFillippo*, 443 U.S. 31 (1979) (arrest made in good faith reliance upon constitutionality of statute upheld); *United States v. Peltier*, 422 U.S. 531 (1975) (no deterrent value in retroactive application of exclusionary rule to search later found to be unconstitutional); *Michigan v. Tucker*, 417 U.S. 433 (1974) (because police officer acted in good faith the exclusionary rule lost "much of its force"); *Brown v. Illinois*, 422 U.S. 590 (1975) (where police officer knew arrest was unlawful the exclusionary rule should particularly be applied). Florida would apply such a rule if this Court provided the authority. *See, Walden v. State*, 387 So.2d 368 (Fla. 1st DCA 1981) (Mills, C.J., *specially concurring*); *see also*, Section 16-3-308 Colo. Stat., adopted July 1, 1981 (establishing good faith exception). As clearly demonstrated herein and in the substantive law and commentary, the rule is without a lawful basis in circumstances such as the case at bar. *Compare also, Major v. State*, 389 So.2d 1203 (Fla. 3d DCA 1980) (reversed on rehearing after *Royer*, finding no consent at all despite overt manifestations of Defendant to contrary and Defendant was warned of his right to refuse). In the words of the Chief Justice in *Bivens* the rule should be modified and permitted to further evolve as is the great tradition of the common law:

> "Instead of continuing to enforce the suppression doctrine inflexibly, rigidly, and mechanically, we should view it as one of the experimental steps in the great tradition of the common law and acknowledge its shortcomings. But in the same spirit we should be prepared to discontinue what the experience of over half a century has shown neither deters errant officers nor affords a remedy to the totally innocent victims of official misconduct."
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> 403 U.S. at 420.

2) THE MERE APPROACH AND CONVERSATION OF INVESTIGATING LAW ENFORCEMENT OFFICERS IS NOT PROHIBITED BY THE FOURTH AMENDMENT.

Subsequent to *Terry v. Ohio*, 392 U.S. 1 (1968) a substantial body of opinions have developed holding that a law enforcement officer may begin an investigation by seeking the cooperation of the subject of the investigation and that such a contact does not give rise to any constitutional prohibitions.[4] *See, also*, 3 La Fave, *Search and Seizure, a Treatise of the Fourth Amendment* Section 9.2, (g) at 46-57 (1978); ALI Model Code of PreArraignment Procedure, Section 110.1, PP157-161 (Proposed Official Draft, adopted May 20, 1975). Additionally, in *Schneckloth v. Bustamonte*, 412 U.S. 218, 230-231 (1973), the Court again noted that:

> "It is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes. *Such inquiries, although courteously made and not accompanied with any assertion of a right to enter or search or secure answers, would permit the criminal to defeat his prosecution by voluntarily revealing all of the evidence against him and then contending that he acted only in response to an*

[4] *See, e.g., United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979) (the momentary possession of the defendant's ticket is *not* a "stop"; the officers acquired articulable suspicion through the defendant's false identification prior to walking away the defendant's ticket); *United States v. Price*, 599 F.2d 494, 498 (2d Cir. 1979); *United States v. Wylie*, 569 F.2d 62 (D.C.Cir. 1977); *State v. Shy*, 373 So.2d 145 (La. 1979); *People v. Kennedy*, 66 Ill. App.3d 267, 383 N.E.2d 713 at 718-719 (1978) (merely that a police officer engages an individual in conversation and no restraint has been placed upon the individuals freedom to walk away, does *not* constitute a "stop" even though the encounter was investigative in nature); *State v. Thompson*, 296 N.C. 703, 252 N.E.2d 776 at 778 (1979) (no one is protected by the constitution against the mere approach of police officers in a public place).

implied assertion of unlawful authority. [Quoting *People v. Michael*, 45 Cal.2d at 754, 290 P.2d, at 854, Traynor, J.]." [Emphasis added.]

Finally and perhaps most instructive herein, the Supreme Court in Schneckloth in fact rejected the "coercion-from-courtesy" test of constitutionality:

> "[In *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1970)] the court determined that a suspect's wife was not operating as an agent of the State when she handed over her husband's guns and clothing to the police. *We found nothing constitutionally suspect in the subjective forces that impelled the spouse to cooperate with the police.* "Among these are the simple but often powerful convention of openness and honesty, the fear that secretive behavior will intensify suspicion, and uncertainty as to what course is most likely to be helpful to the absent spouse." Id., at 488, 91 S.Ct., at 2049. [Emphasis added].
>
> *Id* at 233, n.15.

In *United States v. Mendenhall*, ____ U.S. ____, 100 S.Ct. 1870 (1980) the defendant had claimed that the mere approach and conversation of law enforcement officers at the Detroit Metropolitan Airport was a seizure. In rejecting the defendant's claim, Justice Stewart writing for the Court specifically articulated the mere contact concept:[5]

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[5]The contrary view is presented in *State v. Frost*, 374 So.2d 593 (Fla. 3d DCA 1979) wherein the Court held that:

> "In applying these standards to airport searches like the one involved in this case, many courts have held that a Fourth Amendment stop occurs as soon as officers initially approach an individual, identify themselves, and begin to question him.
>
> * * *

"We adhere to the view that a person is "seized" only when by means of physical force on a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554, 96 S.Ct. 3074, 4081, 49 L.Ed.2d 1116.

* * *

"The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official. See, *Terry v. Ohio, supra* 392 U.S., at 31, 32-33, 88 S.Ct., at 1885-1886 (Harlan, J., concurring). See also A.L.I., Model Code of Pre-Arraignment Procedure §110.1(1) and commentary at 257-261. In short, nothing in the record suggests that the respondent had any *objective* reason to believe

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(Footnote 5 Continued)

> We are attracted by the reasoning contained in these decisions, but we need not go nearly so far in resolving the problem presented in this case."

The Court herein declined to disapprove of the Frost dicta. See, 389 So.2d 1018, at 8; *see also, e.g., Correa v. State,* 389 So.2d 1204 (Fla. 3d DCA 1980) (assuming mere approach of a police officer is a show of authority); *Monohan v. State,* 390 So.2d 756 (Fla. 3d DCA 1980) (assuming after *Royer* that the approach of police officers is a stop). The dicta in *Frost* has been given force of law in Florida.

that she was not free to end the conversation in the concourse and proceed on her way, *and for that reason we conclude that the agent's initial approach to her was not a seizure."*

Id, at 1877.

The *Mendenhall* Court then analyzed the transaction and found that it had none of the trappings of a seizure:

"On the facts of this case, no "seizure" of the respondent occured. [1] The events took place in the public concourse. [2] The agents wore no uniforms and displayed no weapons. [3] They did not summon the respondent to their presence. [4] but instead approached her and identified themselves as federal agents. [5] They requested, but did not demand to see the respondent's identification and ticket. Such conduct without more, did not amount to an intrusion upon any constitutionality protected interest."

Id, at 1877.

In further analysis the *Mendenhall* Court also rejected the analysis in *Frost,* and implicit in the *Royer* opinion herein:

"Our conclusion that no seizure occurred is not affected by the fact the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her responses do not depend upon her having been so informed. See *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 054. *We also reject the argument that the only inference to be drawn from the fact that the respondent acted in a manner so contrary to her self-interest is that she was compelled to answer the agents' questions.* It

may happen that a person makes statements to law enforcement officials that he later regrets, but the issue in such cases is not whether the statement was self-protective, but rather whether it was made voluntarily.

"The Court's decision last Term in Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357, *on which the respondent relies, is not apposite.* It could not have been plainer under the circumstances there presented that Brown was forcibly detained by the officers. *In that case, two police officers approached Brown in an alley, and asked him to identify himself and to explain his reason for being there. Brown "refused to identify himself and angrily asserted that the officers had no right to stop him,"* id., at 49, 99 S.Ct., at 2639. *UP TO THIS POINT THERE WAS NO SEIZURE.* But after continuing to protest the officer's power to interrogate him, Brown was frisked, and then arrested for violation of a state statute making it a criminal offense for a person to refuse to give his name and address to an officer 'who has lawfully stopped him and requested the information.'" [Emphasis added].

Id, at 1878.

Accord, e.g., United States v. Fry, 622 F.2d 1218 (5th Cir. 1980); *United States v. Elmore; United States v. Wylie, supra,* at n. 4.

In the case at bar, *as in Mendenhall,* the events 1) took place upon a public concourse; 2) the officers wore no uniforms and displayed no weapons; 3) the officers did not summon the defendant 4) but instead the officers approached him and identified themselves 5) requested but did not demand the Defendant's identification and ticket and 6) the officers

posed a few questions, *the primary of which was the false identification the Defendant had given* (the same circumstance as in *Mendenhall*). *See*, 40A-45A. In correctly balancing the compelling needs of society for effective law enforcement against the minimal intrusion if any herein, this Court should also consider that the primary consideration of a narcotics officer in the present circumstance is to identify himself to alleviate the possibility of sudden violence from a nervous courier who doesn't want to be "ripped off" and left in the trunk of an automobile in the Everglades. The *sudden* and *brutal* violence of drug traffic in South Florida cannot be *gainsaid*. See, PA1-PA68. As the Court stated in *United States v. Garcia*, 450 F.Supp. 1020, at 1024 (E.D.N.Y. 1978):

> "Given the gravity of the offense suspected, the ease with which narcotics may be disposed of, and the difficulty, almost impossibility, of later tracing the suspect, the agents were at least entitled to make a polite request for defendant's identification and airline ticket. To put it another way the facts suggested a sufficiently high probability of guilt to ask even a blameless man to identify himself. *Merely to require identification from an innocent person whose actions by coincidence fit the pattern from which serious crime may reasonably be suspected is not to exact a disproportionate or unreasonable price.*" [Emphasis added].

The overwhelming weight of the foregoing authority and the wisdom of the panel decision in the case at bar, as manifestly concurred in by the *Schneckloth* and *Mendenhall* courts is directly applicable to the present circumstance. No one is protected by the constitution from the mere approach of and voluntary conversation with a police officer. The Defendant's fundamental premise therefore fails.

3) THERE IS SUBSTANTIAL COMPETENT EVIDENCE, WHICH THE TRIAL COURT CHOSE TO BELIEVE, THAT THE DEFENDANT FREELY AND VOLUNTARILY CONSENTED TO THE ENTIRE TRANSACTION.

Given the conclusion that there was never a primary illegality in the case at bar, this Court need only examine the nature and extent of the evidence before the trial court to determine that the evidence herein was sufficient to sustain a finding of voluntariness as to the remainder of the transaction. *See, Mendenhall,* 100 S.Ct. at 1878-1879. The question of voluntariness is a question of fact to be determined, *not* from facts taken in isolation, but rather from the light of *all* of the circumstances. *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973).

In the case at bar, the trial court was presented with conclusive, salient evidence, *which it chose to believe,* showing that the Defendant consented and the voluntariness of the Defendant's consent: 1) the Defendant was shown to be a twenty-two (22) year old, adult male; 2) the Defendant is a college graduate; 3) the detectives approached the Defendant and asked him if he had a moment to talk; 4) the Defendant voluntarily provided his identification and ticket; 5) the detectives asked if he would accompany them to the other area a few feet away; 6) the Defendant was asked if he would consent to the search; 7) the Defendant produced the key for one bag and said it was okay to open the other bag and 8) the entire transaction was conversational, courteous and polite and the Defendant had no physical impairments; appeared lucid and alert and understood everything. In addition to these factors, the officers wore no uniforms and displayed no weapons. There is no evidence of overt coercion, youth, lack of education, low intelligence; harsh questioning or use of force.

The Florida District Court of Appeal in response to the foregoing substantial evidence of consent, flatly claimed that the Defendant's consent was tainted because 1) the Defendant was told that the officers suspected him of transporting narcotics; 2) that the Defendant "silently acquiesced" and moved with the officers to the "police room"; 3) that the Defendant's ticket was retained and 4) that the Defendant's luggage was "stopped" without the Defendant's permission. *Id* at 1016-1020. The District Court concluded that therefore the Defendant was *arrested. The Defendant subjectively testified however that he was not under arrest in the room. See,* 86A. Additionally, the *Defendant* was not affected by any of the matters noted in the District Court's reassessment of the facts *and did not subjectively point to any of these grounds in his testimony. See,* 81A-84A; 86A. He testified only that he did what he did, "because they were police officers." 81A-82A, *see,* 83A-84A; 86A. The Defendant stated no other reason for his claim of a detention. Consistent with the State's first argument above, we are here arguing in an ivory tower, matters, which the Defendant and the police officers never imagined. The Defendant overtly manifested consent to the officers in a "spirit of apparent cooperation." The officers were entitled to rely upon such manifestations of consent in the case at bar. This Court should not years later permit the Defendant who revealed all, now suddenly state that he acted only in response to a subjective implied assertion of authority. *See, Schneckloth,* 412 U.S. at 230-231.

The District Court's singular focus upon whether or not the Defendant was illegally detained is a failure to apply the proper standard, the "totality of the circumstances" test under *Schneckloth.* In *United States u Watson,* 423 U.S. 411, at 425 (1976) the Court held that the fact of an arrest alone has never been sufficient to vitiate consent. In *Mendenhall* the court rejected "mere silent acquiescence" and movement to a room nearby, as neither factors establishing an arrest nor vitiating a lawful consent:

> "The District Court specifically found that the respondent accompanied the agents to the office 'voluntarily in a spirit of apparent cooperation' quoting *Sibron v. New York*, 392 U.S. 40, 63, 88 S.Ct. 1889, 1903, 20 L.Ed.2d 917. Notwithstanding this determination by the trial court, the Court of Appeals evidently concluded that the agent's request that the respondent accompany them converted the situation into an arrest requiring probable cause in order to be found lawful. But because the trial court's finding was sustained by the record, THE COURT OF APPEALS WAS MISTAKEN IN SUBSTITUTING FOR THAT FINDING ITS VIEW OF THE EVIDENCE. *See Jackson v. United States*, 122 U.S. App.D.C. 324, 353 F.2d 862 (1965)."
>
> 100 S.Ct. at 1878.

As did the federal Circuit Court in *Mendenhall*, the Florida District Court of Appeal herein was also mistaken in substituting its judgment for that of the trier of fact.[8] *Compare also, Major v. State, supra* (reversed on rehearing after *Royer* finding no consent despite Defendant's overt manifestations to the contrary). *A finding of consent should not be overturned "unless clearly erroneous". See, e.g., United States v. Price*, 599 F.2d 494, at 504 (2d Cir. 1979). The evidence was not simply so overwhelming that either this Court or the District Court should intrude and overrule the trier of fact. The District Court has applied the *extraordinary* standards of review of consent, which was rejected in *Schneckloth*, to defeat any State prosecution based upon consent. As reflected in *Edwards v. Arizona*, ____ U.S. ____, 101 S.Ct. 1880 (1981), this is a patently erroneous standard of review under the Fourth Amendment.

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[8] In addition to the characterization of "silent acquiesence" the reference by the *Royer* court to "the police room" is also not supported in the record. Johnson specifically testified that it was *not* a "police room" and had no "police" trappings whatsoever. *See*, 45A-46A.

4) THE DEFENDANT'S LUGGAGE HAD NO CONSTITUTIONAL RIGHT NOT TO BE STOPPED.

As noted above, the Florida District Court placed great emphasis upon the fact that the officers retrieved the Defendant's luggage. *See*, 389 So.2d at 1017-1018. Johnson indicated that he asked for consent and to open the suitcases and that after the conversation with the Defendant Johnson went and got the bags. *See*, 74A, 46A-48A. Any transaction regarding the bags should also be sustained on the consent theory.[7] Alternatively, as discussed below, the bags were properly "stopped" after the Detectives had reasonable suspicion for the "stop" of luggage. *See*, *United States v. West*, 651 F.2d 71, at 74 (1st Cir. 1981). The "stop" was also proper in considering the exigency of the situation, the needs of the public and law enforcement as weighed against such a minimal intrusion. *See*, *Mendenhall*.

The State submits, however, that the "stop" of the Defendant's bag is not a constitutional event and should be governed by the doctrine of "so what?" *See*, Moylan, Charles E., "The Threshhold Question of the Application of the Fourth Amendment or the Doctrine of 'So What?'," 75 So. Ill. L.J. 118 (June, 1977). It is well settled that the Fourth Amendment protects the privacy of persons and not things or places. *Cardwell v. Lewis*, 417 U.S. 583, 588 (1974); *Warden v. Hayden*, 387 U.S. 294, 304, (1967); *Nixon v. Administrator of General Services*, 408 F. Supp. 321, at 358 (D.C.D.C. 1976). The State submits that *absent* a concurrent "seizure" of the person in the thing, a "seizure" of the thing for further

[7]Metropolitan Dade County is the owner through its offices of the premises of Miami International Airport. *Burton v. Dade County*, 166 So.2d 445 (Fla. 1964); *North American v. Byrd*, 61 So.2d 198 (Fla. 1952); *Miami Beach v. Crandon*, 159 Fla. 504, 32 So.2d 153 (1947). By virtue of its ownership, Metropolitan Dade County and its officers have an unqualified right of access to the premises.

investigation is without constitutional impact. *See, United States v. Van Leeuwen*, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 807 (1970); *see, also, United States v. Outland*, 476 F.2d 581 (6th Cir. 1973). In *Van Leeuwen, based upon mere viceral suspicion*, a first class mail package for domestic delivery was detained for more than twenty-six (26) hours until additional facts could be gathered to obtain a warrant. The *Van Leeuwen* court held that there was no constitutional interest invaded by holding the "thing" pending further investigation to raise sufficient facts for a warrant. 397 U.S. at 252. *See, also, United States v. Goldstein*, 635 F.2d 356 (5th Cir. 1981) (movement of bag for dog sniff is not a seizure).

Furthermore, where as in the case at bar, the Defendant has given up his bag to a third party, even as a bailee, the thing is lawfully subject to police scrutiny. *Cardwell v. Lewis, supra.* In *Cardwell*, the court upheld a detailed police examination and the taking of paint scrapings and other incriminating physical evidence from the defendant's car where the defendant had left his car in a public parking lot. 417 U.S. at 591-592; *see, also, Alderman v. United States*, 394 U.S. 165 (1969) (The Fourth Amendment does not protect those persons engaged in crime from risk that those who they communicate with or associate with will cooperate with the police); *Frazer v. Cupp*, 394 U.S. 731 (1969), (consent of third party to examination of the thing is without constitutional impact); *United States v. Novello*, 519 F.2d 1078 (5th Cir. 1975); *cf., also, Hester v. United States*, 265 U.S. 57, 58 (1924) ("open fields" doctrine).

5) THE DETECTIVES HAD ARTICULABLE SUSPICION FOR A BRIEF DETENTION OF THE DEFENDANT FOR FURTHER INVESTIGATION AND/OR PROBABLE CAUSE TO BELIEVE THAT THE DEFENDANT WAS ATTEMPTING TO TRANSPORT ILLICIT NARCOTICS THROUGH MIAMI INTERNATIONAL AIRPORT.

The State submits that the Defendant was not detained or seized at any point. In *Mendenhall* the Court noted that in *Terry* the Court did not consider that the Defendant was seized until he was actually physically restrained. The *Mendenhall* court concluded that:

> "We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would not have believed that he was not free to leave.[8] Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."
>
> *Id,* at 1877.

In the case at bar, the conversation was plainly conversational in tone; the officers were in plain clothes; all inquiries were requests rather than demands and there was no physical contact. Under *Mendenhall,* there was no detention

---

[8]The reasonable person standard is of course, "a reasonable [person] *innocent* of any crime." *United States v. Wylie,* 569 F.2d 62 at 69-70 (D.C. Cir. 1977).

or seizure within the meaning of the constitution. *United States v. Elmore*, 595 F.2d 1036, at 1042 (5th Cir. 1979), *cert. den.*, 447 U.S. 910 (1981), *see also*, *United States v. West*, 651 F.2d 71, at 73 (1st Cir. 1981).

The officers conversational statement that they had reason to believe that the Defendant was transporting narcotics did not automatically convert the transaction to a seizure. Certainly such information was not an accusation in the conversational tone of the transaction, but rather was only a natural part of the investigation of the circumstances as the officers saw them. The State submits that in any police encounter, the *innocent* citizen may be naturally be curious and inquire as to why the police may wish to speak with him. The citizen *innocent* of any crime would offer an explanation or even inquire further. The person *innocent* of any crime would offer his bag for examination or even demand to know why he was suspected of carrying narcotics. The *innocent* person would certainly not feel compelled by such a mere statement. To ostracize and isolate law enforcement officers from what is obviously only voluntary discourse with citizens on the street; requiring that they only approach persons that they don't think have committed a crime, is not required under the Fourth Amendment and serves only to strain the Constitution through a filament of unrealistic exactitude. *Terry v. Ohio.*

Similarly, the District Court's focus upon what it perceived as the retention of the Defendant's plane ticket, relying upon *State v. Frost*, 374 So.2d 593 (Fla. 3d DCA 1979) is erroneous. In *Frost*, which was *a state appeal*, the court *held* that because it was a state appeal, and the appellate record *failed to show* that the defendant's license and airline ticket were *immediately* returned to the defendant, the Court would *assume* the ticket and license were not immediately returned. *Id*, at 595-596, 598. *The Frost Court concluded that therefore automatically, a "stop" had been effected by*

the officers, despite substantial evidence to the contrary. Id at 598; *contra, United States v. Elmore*, 595 F.2d 1036 (5th Cir. 1979). In its holding the *Frost* severely criticized the United States Fifth Circuit Court of Appeals in *Elmore*, for what the *Frost* court viewed, as *holding*, "that it makes a constitutional difference as to the restraint of one's liberty whether an officer with a traveler's ticket in his hand remains face to face with the individual or walks away from him," *and holding*, that the fruits of an unlawful search or seizure [can] retroactively serve to sustain it." *See*, 374 So.2d at 598, n. 4. *Contrary* to Frost *Elmore* approved the "mere contact" concept and further held that in the transaction with the defendant there was no siezure of the defendant until agent Markonni *walked away* with the defendant's ticket.[9] 595 F.2d at 1040-1042.

In the case at the ticket never left the Defendant's presence and was left with him when Detective Johnson retrieved the bags. *See*, 71A. Johnson testified that he held the ticket in the absence of a request for its return. Under *Elmore*, where the ticket was not taken from the Defendant's presence, there is no constitutional seizure. This conclusion is particularly appropriate in view of the fact that the trial court did find that the transaction was voluntary in the totality of the circumstances. Again, the State submits that an *innocent* person would as Detective Johnson implied asked for his ticket back. If the Defendant had asked for his ticket back and refused to permit an examination of his bag, then the officers would have had to make a choice at that

[9]*Elmore*, is now generally cited as the correct statement of *the law* in the United States Fifth Circuit. *See, e.g., United States v. Williams*, 647 F.2d 588 (5th Cir. 1981); *United States v. Moeller*, 644 F.2d 518 (5th Cir. 1981); *United States v. Herbst*, 641 F.2d 1161 (5th Cir. 1981); *United States v. Lara*, 638 F.2d 892 (5th Cir. 1981); *United States v. Berry*, 636 F.2d 1075 (5th Cir. 1981); *United States v. Berd*, 634 F.2d 979 (5th Cir. 1981); *United States v. Pulvano*, 629 F.2d 1151 (5th Cir. 1980); *United States v. Robinson*, 625 F.2d 1121 (5th cir. 1980); *United States v. Bowles*, 625 F.2d 526 (5th Cir. 1980); *United States v. Fry, supra.*

point to detain the Defendant or not. Merely that the Defendant, who was clearly guilty, cooperated out of the fear that refusal would intensify suspicion or because of "subjective forces impell[ing]" him to cooperate does not rise to constitutional significance. *See, Schneckloth*, 412 U.S. at 233, n. 15. This result should particularly obtain in the case at bar when considering the grave public interest involved and the minimal and momentary intrusion in transactions like the present case. *See, United States v. Mendenhall.* Additionally as discussed below, Miami International Airport is the functional equivalent of a border for these officers. Within minutes the Defendant would be gone forever. With such a specialized and compelling government interest in stemming narcotics traffic the intrusion if any here is constitutionally reasonable. *Id., see, also, United States v. Cortez*, ____ U.S. ____ ,101 S.Ct. 690 (1981).

Finally, the District Court's adamant focus upon the movement forty feet to the room as making the transaction an arrest is also erroneous. First of all *Mendenhall* makes it quite plain that movement alone does not even make a voluntary transaction, not voluntary. Secondly, assuming a brief detention for movement to the room, any detention of the Defendant for further investigation did *not* rise to an arrest simply because of limited *movement* to a room forty (40) feet away. *Mendenhall.* The movement to the room did not become an arrest, where danger to the public in a crowded airport and avoiding possible embarrassment to the Defendant are among legitimate law enforcement concerns[10]

---

[10]See generally, United States v. Vasquez-Santiago, 602 F.2d 1338, at 1971 (2d Cir. 1979), *United States v. Smith*, 574 F.2d 882, at 884 (6th Cir. 1978); *United States v. Chatman*, 573 F.2d 565, 567 (9th Cir. 1977) ("it was not improper * * * to arrange that [the interrogation of a suspect stopped in the airport] take place free from public view with its attendant embarrassment"); *United States v. Oates*, 560 F.2d 45, at 57 (2d Cir. 1977) (proper to move suspects into a nearby office, a place more conducive to insuring the safety of other passengers in the crowded departure area); *United States v. Van Lewis*, 409 F. Supp. 535, at 545 (E.D.Mich. 1976)

and where the transaction lacks any traditional indicia of an arrest and the Defendant subjectively stated that he was *not* under arrest in the room. *See, Michigan v. Summers*, ____ U.S. ____, 101 S.Ct. 2587 (1981). The District Court's reliance upon *Dunaway v. New York*, 442 U.S. 200 (1979) for the principle that any movement is an arrest, is misplaced. In *Michigan v. Summers, supra*, the Court rejected any absolute view of *Dunaway* explaining that:

> "Although we refused in *Dunaway* to find an exception that would swallow the general rule, our opinion recognized that some seizures significantly less intrusive than an arrest have withstood scrutiny under the reasonableness standard embodied in the Fourth Amendment. In these cases the intrusion on the citizen's privacy "was so much less severe" than that involved in a traditional arrest that "the opposing interests in crime prevention and detection and in the police officer's safety" could support the seizure as reasonable."
>
> *Id.*, at 209.

In *Dunaway* the defendant was physically driven away to the police station rather than merely moving a few feet as in the case at bar and was detained for more than two hours as opposed to the ten or fifteen minutes in the case at bar. The present cause is much less severe than that presented in *Dunaway* and is further justified by clearly reasonable law enforcement interests. Clearly under *Summers* the seizure herein did *not* become an arrest.

(Footnote 10 Continued)

("There are many cogent reasons for not interrogating travelers in the hustle and bustle of the airport's public areas. These involve the safety of both parties, the ability to converse effectively, the embarrassment to the person detained, and others.").

Furthermore, the *Summers* Court, in further rejecting any absolute rule under *Dunaway*, reviewed *Terry; United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) and *Adams v. Williams*, 407 U.S. 1921 (1972) and further cited *United States v. Cortez* ____ U.S. ____, 101 S.Ct. 690 (1981) and concluded that special law enforcement interests could justify seizures on less than probable cause, which were more than just a momentary *Terry* stop. *Id*, at 2592-2593. The Court noted that the examination should be as to the character of the intrusion and its justification. The essential error in the present cause is that the Florida Court did not properly apply this essential balancing test in its analysis. Under *Summers*, the character of the official intrusion is so minimal that in *Mendenhall*, as in the case at bar, the Court found the entire transaction to be voluntary. Similarly, the justification for the minimal intrusion in the case at bar is paramount:

> "The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs, including heroin, may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement."

Mendenhall, 100 S.Ct. at 1881 (Powell, J., Burger, J., Blackmun, J., *concurring*); *see also*, PA1-PA67. The special law enforcement interests herein do justify a seizure on less than probable cause.

If on the other hand, the officers had chosen to detain the Defendant their actions would have been constitutionally

reasonable. An officer is entitled to rely upon his *training* and *experience* to ascribe suspicious significance to the whole of a circumstance and suspicious significance to behavior that might appear wholly innocent to an untrained observer. *Mendenhall*, 100 S.Ct., at 1882 (Powell, Burger, Blackmun, *concurring*). *Brown v. Texas*, ____ U.S. ____, 99 S.Ct. 2637, at 2641, n. 2 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). In *United States v. Van Lewis*, 556 F.2d 385 at 389 (6th Cir. 1977), the court observed that in weighing the arrest of an airport narcotics courier, "probable cause is the sum total of [the] layers of information and the synthesis of what the police have heard, what they know and what they observe as trained officers. We weigh not individual layers, but the laminated whole"; *see also, e.g., United States v. Elmore*, 595 F.2d 1036, at 1038, 1042 (5th Cir. 1979), (false name given to airline, sufficient articulable suspicion); *United States v. Rico*, 594 F.2d 320 (2d Cir. 1979); *United States v. Smith*, 574 F.2d 882 (6th Cir. 1978); *United States v. Mays*, 524 F.2d 803, at 806 (9th Cir. 1975); *United States v. Richards*, 500 F.2d 1025 at 1029 (9th Cir. 1974), (false and evasive statements, warrant suspicion criminal activity was afoot).

In the case at bar, the eventual arrest of the Defendant was *not a random circumstance*. Based upon their experience and training in the narcotics courier profile and their actual observation of facts derived from the profile, Detectives Johnson and Magdelena were *absolutely correct* in their conclusion based upon their specialized training and experience and observations, that the Defendant was transporting narcotics.

The Detectives in the case at bar had objective articulate facts, which they could point to as probability that the Defendant was committing a felony consisting of, 1) casual dress; 2) twenty-five to thirty-five years old; 3) one way ticket; 4) paying for ticket in *cash only*; 5) using no identification; 6) using no other means of identification such as credit cards or checks; 7) traveling to a "target" city; 8) carrying American

Tourister luggage; 9) placing false identification on the luggage labels required by federal airline regulations and 10) carrying large amounts of cash. *Additionally,* Detective Johnson testified that in his experience of observing passengers eight (8) hours a day and thousands over a period of six months, that the Defendant's agitation was clearly centered on being detected rather than that he was just a "white knuckle" flyer. *See also, United States v. Regan,* D.Ct. Case No. 81-88K, June 30, 1981 (D. Mass. 1981) (PA68-PA70). The Defendant's *testimony did not dispute these material observations of the Detectives.*

When the Detectives verified the false identification, the Defendant failed to dispell their alarm. *The Defendant's explanation that he had not made the reservation was not an explanation as to why he would continue the charade with the airline by placing a false name on his luggage.* Indeed, at the hearing on the Motion to Suppress, the Defendant in fact refused to testify as to who he claims made the airline reservation and refused to testify as to whether "Holt" exists or not. *See,* 90A-91A.

Furthermore, together with the alias and the other observed facts from the profile the Detectives also had the articulable fact that the Defendant was concerned about being detected. *See, United States v. Price,* 599 F.2d at 500 (defendant looking about); *United States v. Vasquez,* 612 F.2d at 1339 (conduct in looking about indicative of fear of detection); *United States v. Elmore,* 595 F.2d at 1038 (apparent anxiety of defendant at being followed); *United States v. Regan,* Case No. 81-88K June 30, 1981 (D. Mass. 1981) (fear at being followed). PA68-PA70, PA80). Also, the Defendant's peculiar conduct and the Detectives observations were made in an area of Miami nationally known for its high incidence of narcotics crime; *which is itself an articulable fact. Brignoni-Ponce,* 422 U.S. at 884-885.

The focus of this Court's analysis, of articulable suspicion and probable cause must be, as the District Court panel's focus was, upon the nature of the offense. There are no eyewitness or bodies, no fingerprints, no forged checks and no stolen property, which the police can point to for probable cause. The crime in this case is purely one of *stealth*, in which the skill and training of these officers must be effective in just a few minutes. *The single and overwhelming purpose of drug couriers to sneak through Miami International Airport by avoiding detection.* The failure to provide proper identification to the airlines is a violation of air travel regulations. The Defendant will argue that this is just a small untruth. *However, the State submits that the concerted effort to avoid identification is of particular and lawful significance to these trained narcotics officers. See, United States v. Elmore*, 595 F.2d 1036, at 1039 (5th Cir. 1979); *see also, United States v. Patino*, 649 F.2d 724, at 727-728 (9th Cir. 1981); *State v. Brant*, Ga. Super. Ct. Case No. A51531, December 4, 1980 (alias) (PA94-PA96). In *Elmore*, the Court specially held that the *observed* facts from the profile, together with the use of an alias *required* that the officers detain the defendant for further investigation:

> *"It would have been a failure of duty had the federal agents not detained Elmore at that point in order to investigate further."*
> 595 F.2d at 1039.

Under *Elmore*, *Mendenhall* and the analysis of probable cause in *United States v. Cortez*, when the detectives discovered the Defendant's alias, they had *at least* reasonable, articulable suspicion and grounds for a seizure of the Defendant under *Summers*, in order to conduct further investigation. It was plainly more likely than not in their training and experience, together with their actual observations that the Defendant was transporting narcotics. The District Court's denial of the validity of their training and experience is plain error under *Mendenhall* and the substantive law.

The development and court approval of the hijacker profile in early airport security programs was an accepted and effective law enforcement response to the deadly serious problem of airplane hijacking. *See, e.g., United States v. Cyzewski*, 484 F.2d 509 (5th Cir. 1973), *cert. dismissed*, 415 U.S. 902 (1974); *United States v. Bell*, 464 F.2d 667 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972). Similarly, a "smuggling profile" has been properly and successfully used by the United States Customs Service. See, *United States v. Forbicetta;* 484 F.2d 645 (5th Cir. 1973); *see also, United States v. Asbury*, 586 F.2d 973, 976-977 (2d Cir. 1978); *United States v. Kallevig*, 534 F.2d 411 (1st Cir. 1976); *see also, State v. Ochoa*, 112 Ariz. 582, 544 P.2d 1097 (1976) (stolen car profile). Informal profiles are used in other disciplines. A doctor making a diagnosis compares observed symptoms to a profile of characteristics exhibited by various diseases. Use of a "profile" is a legitimate method of using one's experience in an organized fashion to assess the likelihood of a particular conclusion. Calling that collective training and experience a "profile" should not prohibit its practical use.

There is, *sub judice*, no justification for a general rule rejecting the use of any "profile". Merely that an officer has written down the characteristics he finds are reliable indicia of criminality should not sway a determination that trained *observations* of those criteria are probable cause. For example an officer may write down as a "robbery profile," that if he observes someone waving a gun in a bank that it is more likely than not that a felony is in progress. Certainly, no court would vitiate the officer's probable cause, because he wrote it down.

In the case at bar, under the facts and circumstances known to the Detectives, the Defendant's alias and failure to dispell the Detectives' alarm that he was in fact a narcotics courier, combined with the other facts developed from the

profile, established *a reasonable belief in these Detectives as trained observers that there was at least reasonable suspicion to believe he was transporting narcotics. See, United States v. Mendenhall*, (Powell *concurring*). *See*, 389 So.2d 1008; 1012 (Panel opinion), *see also, United States v. Price*, 599 F.2d 494, at 504 (2d Cir. 1979), (Lumbard, J., *concurring:* the facts developed from the drug courier profile were *probable cause* to search the defendant's luggage without the defendant's consent). The fact that the Detectives herein derived their cumulative observed facts in this case from the characteristics of the profile does not vitiate a finding of articulable suspicion or probable cause for the Defendant's arrest. *See, United States v. Mendenhall*, (Powell *concurring*); *United States v. Price, supra; United States v. Vasquez*, 612 F.2d 1338 (2d Cir. 1979); *United States v. Vasquez-Santiago*, 602 F.2d 1069 (2d Cir. 1979); *United States v. Oates*, 560 F.2d 45 (2d Cir. 1977); *United States v. Van Lewis*, 556 F.2d 385 (2d Cir. 1977); *United States v. Magda*, 547 F.2d 756 (2d Cir. 1976), *cert. den.*, 434 U.S. 878 (1977); *Hernandez v. United States*, 353 F.2d 624 (9th Cir. 1965); *cert. den.*, 384 U.S. 1008 (1966); *United States v. Garcia*, 450 F.Supp. 1020 (E.D.N.Y. 1978); *see also, United States v. Brignoni-Ponce*, 422 U.S. at 883-884, (investigative stops of limited duration are acceptable at a "border"); *Draper v. United States*, 358 U.S. 307 (1959), ("in dealing with probable cause as the very name implies, we are dealing with probabilities"). In *Mendenhall* Justice Powell in concurring examined the drug courier profile, the training and experience of the officers and their actual observations and circumstances in and concluded that:

> "The jurisprudence of the Fourth Amendment demands consideration of the public's interest in effective law enforcement as well as each person's constitutionally secured right to be free from unreasonable searches and seizures. In applying a test of "reasonableness," courts need not ignore the considerable expertise that law enforcement

officials have gained from their special training and experience. The careful and commendable police work that led to the criminal conviction at issue in this case satisfies the requirements of the Fourth Amendment."

As in *Mendenhall*, the officers' work herein was careful and commendable and should be sustained particularly in view of the specialized training and experience of the officers, considered together with the public interest in effective law enforcement.

6) THE SEARCH OF THE DEFENDANT'S LUGGAGE WITHOUT A WARRANT WAS JUSTIFIED AS EXIGENT OR CONTEMPORANEOUS WITH HIS ARREST.

The State submits that in the present circumstance, the luggage was mobile and it was reasonable for the officers to open the luggage, where within minutes, the luggage would leave the jurisdiction of a Florida magistrate and thus be lost forever. *See, United States v. Valen*, 479 F.2d 467 (3d Cir. 1973); *United States v. Mehciz*, 437 F.2d 145, 147 (2d Cir. 1971); *see, also, Mobility Reconsidered: Extending the Carroll Doctrine to Movable Items*, 58 Iowa L.Rev. 1134 (1973); Note, *The Warrantless Search of a Suitcase Carried by Arrestee Is Constitutionally Permissible Even Though There Is No Danger That the Arrestee Will Get To The Suitcase to Obtain a Weapon or Destroy Evidence*, 9 Houston L.Rev. 140 (1971). Certainly, as the panel herein noted, it is common knowledge that all luggage at an airport is subject to being searched at any time, where the passenger expects to board a plane.

Furthermore, it does not make constitutional sense to say that once an arrest is made that the *de minimus additional*

intrusion of a search of the things in the defendant's possession, where the contraband or stolen goods are known to be, cannot be *reasonably* made. *See, United States v. Robinson*, 414 U.S. 218, 235 (1973); *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970); *Carroll v. United States*, 267 U.S. 132, 153 (1925); *Arkansas v. Sanders*, ____ U.S. ____, 99 S.Ct. 2586, at 2594 (1979) (Blackmun and Rehnquist, JJ., *dissenting*); *United States v. Chadwick*, 433 U.S. 1, at 17-24 (1977) (Blackmun and Rehnquist, JJ., *dissenting*); *see also, Mobility Reconsidered and The Warrantless Search of a Suitcase, supra.* In *Chambers v. Maroney*, 399 U.S. at 51-52, the court remarked that:

> "Arguably because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater.' But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. *For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant.*"
> [Emphasis added].

See, also, United States v. Garcia, 605 F.2d 349, 352-360 (7th Cir. 1979), *cert. den.*, 446 U.S. 984 (1980) (affirming warrantless search of luggage incident to arrest). Once an intrusion has been upon an airport passenger so as to effect a detention and arrest, in *the airport passenger context*, an immediate search of that person's luggage is then only a *de minimus intrusion.* If the contraband isn't there, there's no intrusion at all and the person goes on his way. In the specialized airport setting such a specialized balancing test is constitutionally sound.

VII

CONCLUSION

In the evolution of the common law, it is time for this Court to modify the exclusionary rule and approve the "good faith" exception to the rule. The State further submits that the *prohibitions* of the Fourth Amendment to the United States Constitution find no application in the case at bar. The State would urge this Honorable Court in its deliberation to consider and balance, the compelling interest in stemming the increasing corruption of society from the growing tide of drug traffic and the professional, efficient and very effective law enforcement herein as against the *de minimus* intrusion, if any in the case at bar, upon *legitimate* airline passengers.

RESPECTFULLY SUBMITTED on this 1st day of February, 1982, at Miami, Dade County, Florida.

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/s/ Calvin L. Fox
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in the Supreme Court of the United States

October Term, 1980

THE STATE OF FLORIDA,
Petitioner,

vs.

MARK ROYER,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Florida

APPENDIX TO BRIEF OF PETITIONER

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[COMMITTEE PRINT]

95TH CONGRESS
2d Session
} HOUSE OF REPRESENTATIVES

PROBLEMS OF LAW ENFORCEMENT AND ITS EFFORT TO REDUCE THE LEVEL OF DRUG TRAFFICKING IN SOUTH FLORIDA

REPORT

OF THE

SELECT COMMITTEE ON NARCOTICS
ABUSE AND CONTROL
NINETY-FIFTH CONGRESS
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I. INTRODUCTION

In the middle of June 1977, at the urging of the ranking minority member of the committee, Congressman J. Herbert Burke, the House Select Committee on Narcotics Abuse and Control began an inquiry into the extent and nature of drug trafficking in south Florida. In the fall of 1977 and again in the spring of 1978, the committee dispatched investigators to the scene in order to obtain up-to-date information on the situation in south Florida regarding individuals and groups principally responsible for the trafficking and Federal, State and local law enforcement responses. The committee investigators reported an overwhelming amount of drug trafficking in marihuana and cocaine from South America, principally Colombia, by every conceivable means of transportation, including trawlers, pleasure boats, cruise ships, aircraft and courier. But the information obtained by the committee's investigators did not adequately prepare the members of the committee who traveled to Florida for hearings on June 9 and 10 for the actual extent of the present drug disaster which these hearings revealed.

Marihuana from Colombia is dispatched by the tonload in all manner of vessels, some foreign flag, some American, destined for south Florida. Seizures of marihuana at the Miami airport had quadrupled over the past 6 months. Almost daily, tons of marihuana and kilos of cocaine were interdicted, yet it is clear from testimony given to the committee that these seizures represent only the tip of the iceberg. Despite dedicated and heroic efforts by Federal, State and local law enforcement personnel, the committee estimates that less than 5 percent of the total contraband coming into

south Florida was seized prior to the committee's hearings. The committee found, among other things, that fortunes were being built on the drug trade; that relatively young persons with no visible means of support were paying huge sums of money, hundreds of thousands of dollars in cash on individual transactions, for pleasure boats, homes and other expensive properties; that the drug trade was so pervasive that many millions of dollars in cash were being diverted by the Federal Reserve System to the Miami district in order to meet the demands of the illicit drug trade. The committee discovered that the total gross dollar value of the drug trade in south Florida was at least $7 billion annually, of which the majority represented sales of marihuana and at least $500 million, sales of cocaine.

Testimony made it clear that illegal drug trafficking had, within the last 2 years, become the largest single commercial activity in the Florida area. Such a situation not only breeds disrespect for the law but also, as a recent Miami Herald editorial put it, "erodes the moral fiber of the community." If the Federal Government were to adopt a mistaken policy of overlooking the smuggling of large quantities of marihuana because of an ill-founded notion that marihuana is not "all that harmful" and is being "decriminalized" by several States, grievous harm could be caused. The smuggling of any contraband, especially in large bulky shipments, cannot be countenanced because if traffickers are left free to smuggle, they will soon be dealing in arms, explosives and other terrorist paraphernalia, as is beginning to be the case now. In the Miami area, drug traders have begun to assume the aura of folk heroes. Ordinary citizens expressed grudging admiration for the cash fortunes which these purveyors muster. In its October

1977 investigations and hearings in Chicago, and in its February 1977 activities in New York City the committee had exposed a similar pervasive drug trade and experienced its disastrous effect on the community. As in Chicago and New York, the committee's exposure to the public of these overwhelming, continuous law violations had an immediate, positive effect. An examination of the following escalation of seizures and arrests in the south Florida area since the committee's hearing began on June 9, 1978 will illustrate the immediate and positive effects of this committee's investigations and hearings.

* * *

Law enforcement responses to this horror were even more disturbing than the actual situation. The manpower, funds and material available to Federal, State and local law enforcement agencies were found to be totally inadequate to deal with the traffic. Only round-the-clock efforts of highly devoted officials made whatever seizures and arrests that were accomplished possible. Moreover, testimony at the hearings suggested that many judges of the Federal and State courts in Florida do not regard drug smuggling as a serious offense. Florida sentences meted out to convicted smugglers are 25 percent more lenient than the national average. Thus arrest and conviction do not now act as a deterrent. Rather it is regarded by most of the smugglers as an acceptable cost of doing business similar to the loss incurred through the confiscation of high cost vehicles, ships and airplanes which are intercepted with contraband aboard.

One of the spectacular ironies of most U.S. Coast Guard seizures on the high seas is that a foreign crew

on a ship holding contraband has not violated any criminal law of the United States. The Coast Guard and U.S. Customs merely interrogates and repatriates crews of such vessels. In the case of Colombian nationals, once repatriated, they are released without prosecution or other deterrent action within 72 hours. The committee engaged in examining all of the Federal statutes that bear upon this problem and will soon recommend to the Committee on the Judiciary amendments that hopefully will close this and other loopholes. In meetings with the State Department subsequent to the hearings, the committee was assured that current efforts are being made to secure prosecutions in Colombia when such crews are returned, under the DEA "JANUS" program.

Despite the committee's most urgent efforts, it is unable to determine how much marihuana, cocaine and heroin enters the United States through Florida. The State of Florida has 8,425 miles of shoreline, and as many as 200 clandestine airstrips in south Florida alone, most of them in remote places in the Everglades and 7,000 daily international travelers enter the Port of Miami through its airports alone.

The report that follows includes findings, conclusions and recommendations based upon the testimony taken by the committee in Hollywood, Fla. on June 9, 10, 1978. The committee will transmit to the appropriate committee of Congress legislative recommendations which will enhance the current Federal enforcement arsenal to alleviate the Florida smuggling problem. Most of these are itemized.

In addition, on June 10, 1978, the committee, comparing the south Florida drug smuggling problem to a national disaster, called for emergency action by the Federal Government to alleviate problems of limited law enforcement resources.

During the course of hearings held in Hollywood, Fla. on June 9 and 10, 1978 a telegram was sent by the committee to the White House, State Department, DEA and Customs to alert them to the disaster situation that the Select Committee had identified related to the smuggling of narcotics through south Florida. The committee asked that immediate and extensive Federal assistance be provided to south Florida law enforcement agencies to stem the flow of narcotics through this region.

[Telegram]

DR. PETER BOURNE–White House.
MATHEA FALCO–Department of State.
Hon. ROBERT CHASEN–Customs.
Hon. PETER B. BENSINGER–DEA.

House Select Committee has just completed extensive investigations and hearings in south Florida. What we have seen and heard convinces us that this area is in the midst of a catastrophic and overwhelming drug disaster. Therefore as in any other natural disaster faced by this nation this situation must be countered by whatever means are necessary and whatever materiel is necessary to cope with this problem. This situation is so serious we must take immediate action to stem the tide of illegal drugs into the United States through south Florida. We therefore request an emergency meeting with you on Tuesday, June 13, for the purpose

of taking immediate emergency steps to assist the dedicated overwhelmed law enforcement services here.

LESTER L. WOLFF, *Chairman,*
J. HERBERT BURKE,
DANIEL AKAKA,
LOUIS FREY,
BENJAMIN GILMAN,
Members of Congress.

Upon return to Washington a meeting was held on June 13, 1978 with the appropriate Federal authorities and Members of Congress to obtain an immediate response to these issues.

* * *

At this meeting the Members requested that an action plan be presented with the sponsorship of the President to reply to the declaration of emergency, which the Select Committee identified in south Florida. The following proposals were set forth by the committee and immediate implementation was promised by the executive agencies:

1. A special White House review board would be established to coordinate all new Federal law enforcement efforts in the area.

2. The implementation of special enforcement task forces to launch Federal agency joint operations including prosecutorial coastline enforcement and intelligence-assistance in this area.

3. Military assistance which would not be in conflict with *posse comitatus* legislation to include materials to

be supplied to law enforcement such as: aircraft, boats and sophisticated electronic surveillance equipment.

4. International assistance which would provide high-level input, particularly justice systems within Colombia, via U.S. Centac investigations, to provide for effective prosecution of Colombian nationals engaged in trafficking and living in Colombia.

5. Additional requests to the Department of Justice which would alleviate the disparity of light sentencing of drug traffickers in the Florida region to be coordinated between the Attorney General and the Governor of Florida. The additional assignment of Customs personnel in Colombia, as well as south Florida, to aid in the analysis of intelligence, this activity to be augmented by additional DEA personnel in Florida and Colombia.

6. Review of current U.S. legislation to control territorial waters and equate drug smuggling with piracy and slavery. This activity to take place in conjunction with new treaty initiatives with foreign countries to allow for expedient seizures of narcotics and smugglers on the high seas.

7. A total review of equipment and manpower currently being utilized in the antinarcotics activities currently in use in the southeast region of the United States.

8. That a full-time Federal narcotics strike force be established in south Florida.

The Federal response was received on July 18, 1978 and is reproduced on page 15 of this report.

II. SUMMARY OF TESTIMONY TAKEN IN FLORIDA

On June 9, the regional director of the Drug Enforcement Administration, the regional director of the Customs Service and the Commandant of the regional Coast Guard station appeared before the committee. The regional director of DEA, Mr. Frederick A. Rody, Jr., stated that "South Florida has become inundated with marihuana and cocaine smuggling and trafficking." Seizures by the Coast Guard, Customs and DEA, in the past 6 months, represent "more drugs than were collectively seized by the U.S. Federal law enforcement community during the entire previous year." Mr. Rody indicated to the committee the dimensions of drug trafficking and the economics associated with the trafficking. He emphasized that the revenue loss to the United States in untaxable income is incalculable. He concluded that the smugglers are better equipped and have more financial resources than the entire drug law enforcement community. There are a number of reasons for this phenomenal increase in drug trafficking in south Florida:

Profits are high and risks disproportionately low in drug smuggling.

There are inadequate deterrents, particularly in the area of bail and sentencing.

The judiciary branch of the Government can give only limited attention to these cases because of heavy dockets.

International agreements on jurisdiction over the high seas are inadequate.

Intelligence gathering and sharing by Federal, State and local drug law enforcement communities continues to be limited.

For reasons of geography and economics south Florida is a natural entry point for contraband from South America.

Mr. Rody testified that recent efforts in interagency intelligence sharing, between Federal and State law enforcement have greatly improved and new intiatives on this level would continue. The linkage of computer intelligence systems (EPIC) with the State enforcement networks of Florida, Georgia and South Carolina as well as combined operations between Coast Guard, Immigration and Customs yield significant results.

Mr. Robert N. Battard of the U.S. Customs Service and Rear Adm. Robert W. Durfey of the U.S. Coast Guard echoed Mr. Rody's sentiments. They reiterated that seizures during the first 4 months of 1978 make it clear that the total tonnage of marihuana and cocaine entering south Florida is steadily increasing and is overwhelming all containment efforts.

The Coast Guard is charged with 10 missions, including law enforcement, on the east coast of the United States, an area of over 1,100 miles. It possesses only 4 cutters and 13 patrol boats to perform its duties. In addition, Customs has eight outdated aircraft and two helicopters. At the time of these hearings, only one rented aircraft was airworthy.

With these limited resources the ability for effective patrol of Florida coastal waterways is virtually impossible. There are basically three routes for drug trafficking from South America, the shortest of which is the windward passage between Cuba and Haiti. The next is the Yucatan Channel between Mexico and Cuba and,

finally, the Mona passage bordered by the Dominican Republic and Puerto Rico. From these routes the smugglers land on either coast of Florida or else, using "mother-ships" they unload their cargo outside the 12-mile limit. There are hundreds of thousands of boats registered in the tri-State area of South Carolina, Georgia, and Florida and over 20 countries through which contraband can be transshipped.

Both Customs and the Coast Guard have done their best to patrol the three major passages and have successfully interdicted a number of "mother-ships." The Coast Guard's ability to board foreign vessels with the approval of the country whose flag the vessel flies helps immeasurably, but smaller vessels are for the most part free to operate without interference.

In response to the jurisdictional problems regarding narcotics smuggling on the high seas the committee has made a number of legislative proposals which appear in the legislative recommendations section of this report.

Sheriff Edward J. Stack of Broward County, Sheriff Richard P. Wille of Palm Beach County, and Chief Leo Callahan of the Fort Lauderdale Police Department made up the second panel on June 9. They also emphasized the enormous advantage the traffickers have over local law enforcement, primarily because the Federal agencies in the south Florida area do not have adequate manpower, or equipment. Any one major conspiracy case will quickly absorb the meager resources of local law enforcement. While cooperation between Federal and local authorities is excellent, the Federal agencies have no means of supplying needed cash, men or material to supplement

local efforts or support local law enforcement groups in court cases.

Seizures by local law enforcement officials with the help of U.S. Customs are impressive but represent only a very small proportion of the total volume of contraband imported into south Florida.

Witnesses on the third panel on June 9 reiterated the emergency nature of the situation. E. Wilson Purdy, director of the Dade County Public Safety Department, emphasized this point in his written statement. Kenneth I. Harms, chief of the Miami police and Sam Martin, chief of the Hollywood police, testified to this effect. These witnesses stressed that to a great extent the interception of thousands of tons of marihuana and the seizure of hundreds of pounds of cocaine is not totally due to the effectiveness of law enforcement, but rather indicates the tremendous volume of traffic which passes through this region. They stressed that the restraints imposed by limited funds are sometimes misconstrued as a lack of cooperation. Cooperation is excellent, but unfortunately is all too frequently directly dependent upon the availability of manpower and money for investigative expenses and equipment.

Chief Harms outlined two major frustrations which he and his colleagues encounter in combating drug trafficking. The first is the necessity of obtaining court authorized wire taps. Second, many indicted smugglers are released on insufficient bail. Of the some 800 fugitives who had left the jurisdiction after posting bond, more than half were under bail of less than $10,000. To ease prosecution of traffickers Chief Martin called for a

State witness protection plan coupled with the impaneling of an investigative grand jury.

The local police chiefs made it clear that the combined efforts of law enforcement alone will never greatly affect trafficking. The United States must deal directly with the source countries, as it did with Mexico, to reduce the vast supplies of exportable contraband. Chief Harms added that preemptive purchase should be considered a legitimate means of taking supplies off the market.

On the morning of June 10, the committee heard from the airport interdiction unit in Dade County, the chief local law enforcement office for the airport group in Broward County and the DEA group supervisor who coordinates these activities. The airport program began operations in May 1977. Divided into three areas of activities, it is aimed at:

1. Identifying airline employees who might be involved in trafficking;

2. Developing intelligence on domestic drug shipments from Miami; and,

3. Identifying couriers.

The investigation of domestic drug shipments made it plain that a package containing drugs could be shipped at the ticket counter of any airline and reach its destination without being inspected. Sergeant Skip Pearson, who is in charge of the Miami airport detail, estimated that female couriers, carrying between 2 and 6 pounds of heroin or cocaine per trip, bring over 100 pounds of

heroin and a much larger quantity of cocaine into Miami monthly.

Customs examines and clears between 6,000 and 7,000 international travelers from approximately 125 aircraft daily. In addition, the Miami International Airport receives more air cargo than any other port of entry in the United States. This volume of passengers, aircraft and cargo overwhelms the available law enforcement efforts. Although seizure figures are large, law enforcers are interdicting only a small percentage of the actual contraband. The committee asked this panel if the testimony presented at this hearing would have a deterrent effect on smugglers. All three witnesses agreed that no one listening to the testimony would be deterred from attempting to smuggle drugs into Florida. On the contrary, the ease with which smugglers bring contraband into south Florida might encourage amateurs to attempt transactions.

The afternoon session of June 10 included Mr. Atlee W. Wampler III, chief of the Miami Organized Crime and Racketeering Strike Force and Mr. Michael P. Sullivan, assistant U.S. attorney in charge of narcotics prosecution in the U.S. attorney's office appeared before the committee. Mr. Wampler noted that his strike force cannot get involved in investigations that are not closely related to an identified organized crime figure or a qualified "criminal group." While the strike force has prosecuted a number of major cases involving traffickers, narcotics is but one of the priorities Washington assigns them. Mr. Wampler testified that no other area of the United States has been inundated with as many identified organized crime individuals as south Florida. He estimated

that there is over 1,000 racketeers living, working, or retired in south Florida, some of whom dominate particular segments of the narcotics importation and distribution business. Their activities also include hidden interests in legitimate businesses, labor unions, banks and legalized gambling operations. In the course of questioning, Mr. Wampler made it plain that the narcotics business supplies the largest volume of cash to organized crime in that area and made several recommendations for legislative action which would assist his operation. These are referred to in the legislative recommendations section of this report.

Mr. Sullivan testified that Florida judges do not impose sufficiently stiff sentences upon convicted narcotics traffickers to deter the thousands of amateurs that are involved in the business. The cases Mr. Sullivan tries for the U.S. attorney involve complex conspiracies and large amounts of money. His office uses undercover agents, reliable informants, and, most importantly, investigative grand juries. With a grand jury, suspects can be questioned under oath, their books and records examined and their sources of income and assets discovered. Immunity to prosecution can be granted those who would not otherwise testify.

Mr. Sullivan outlined two major problems. First, his unit is over-whelmed by the number of cases reaching his office. Secondly, the "lack of specific law to allow prosecutions of crew members on vessels carrying contraband." At the present time, it is permissible to possess drugs on foreign vessels intended for the United States and it is even permissible to possess drugs aboard an American registered vessel, outside the 3-mile zone.

Mr. Sullivan testified to the financial aspects of drug trafficking. Under Federal banking law, the Currency and Foreign Transactions Reporting Act of 1970, any deposit or transfer in excess of $10,000 must be reported to the Internal Revenue Service. However, major traffickers circumvent this requirement by using easily obtainable sources of false identification themselves or giving false identification to a courier making deposits and withdrawals. In addition, money transferred from American banks to offshore depositories, is virtually untraceable. Traffickers utilize sophisticated international banking services in the Bahamas, Panama, and Switzerland where foreign bank secrecy laws protect their illicit profits.

The committee also heard testimony from State Senator George Firestone, former chairman of the Florida Criminal Justice Task Force. Senator Firestone advocated the use of compliance by regulatory agencies of the State to learn the identity of criminals infiltrating legitimate corporations. He proposed a uniform State law making it possible for State officials to obtain lists of officers, directors and employees of corporations for businesses that are being used as fronts and banks through which money is laundered. The use of regulatory information in identifying infiltration of legitimate businesses was stressed by Senator Firestone as a ready means of combating traffickers.

The Florida State Law Enforcement Department allocated 44 special agents to south Florida; approximately one-third of these investigators work on narcotics trafficking. This department also assigns personnel to the Interagency Narcotics Intelligence System (INIS), a five-agency task force which includes DEA and the three local agencies in Miami.

III. FINDINGS

1. All law enforcement authorities agree that south Florida is the major entry port into the United States for marihuana and cocaine smuggling. They estimate that the gross annual dollar volume of the trafficking exceeds $7 billion ($6.5 billion in marihuana and $500 million in cocaine).

2. South Florida is a prime gateway to the entire east coast of the United States. Florida has 8,425 miles of shoreline on its 1,350 miles of coastline and over 260 airstrips, public and private. Miami airport is the fourth largest in the country, receiving up to 7,000 international passengers a day. There is easy access to south Florida by plane or boat from South America. Planes do not have to refuel en route and many of the boats can make the trip in less than a day.

3. The success of the paraquat-spraying program in Mexico has contributed to the problems in south Florida. Untainted Colombian marihuana has now become the choice of the marihuana abuser, and Colombia is now the major supplier of marihuana to the United States. Most of this illegal substance enters through Florida. Efforts to decriminalize marihuana in small quantities for personal use have led to increased demand for marihuana and higher profits for smugglers. In the past few years cocaine has become popular with certain population groups in the United States, and demand for it has jumped. Major shipping patterns have been established from Peru and Bolivia to Colombia and on to the United States through Florida.

4. Drug seizures by U.S. Customs, Coast Guard, DEA, and local law enforcement officials increase each month. Over 2.5 million pounds of marihuana have been seized through May of this fiscal year, compared to less than 950,000 pounds during the same period last year. Seizure of multiton loads is commonplace. The seizure rate is not due, to any great extent, upon law enforcement activities but rather indicates the volume of narcotics entering through Florida. It is estimated that Customs seizes less than 5 percent of the total amount of illicit drugs transshipped through south Florida.

5. Law enforcement agencies, both Federal, State, and local, are handicapped in dealing with the narcotics traffic by severe shortages of manpower and material and financial resources. The Coast Guard is charged with 10 separate missions for an area covering South Carolina, Georgia and Florida—2,100 miles of coastline. In addition, the Coast Guard is also responsible for over 2 million square miles of ocean, including the Caribbean, the Bahamas, and the Greater and Lesser Antilles. To perform its job of narcotics interdiction, search and rescue, marine science activities, port safety and security, aids to navigation, environmental protection, commercial vessel safety and boating safety, the Coast Guard only has 4 medium endurance cutters, 13 patrol boats, 4 air stations and 3,100 people.

6. Customs is also plagued by a shortage of manpower and material for interdicting narcotics. In Broward County, for example, Customs has 11 inspectors to cover 3 airports, Port Everglades and hundreds of marinas. Money that would otherwise be spent for staff and equipment is budgeted for storage of 130 vessels and 22 aircraft which have been confiscated,

but not yet forfeited. Customs lacks sophisticated equipment to match that of the smugglers. The Florida region is assigned eight outdated aircraft and two helicopters, but at the time of the hearings, only one aircraft—a rented one—was airworthy. Customs has no adequate radar or electronic facilities for tracking incoming planes and boats and must depend upon the military for assistance.

7. The Drug Enforcement Administration is extremely understaffed. They have five agents in Colombia where 70 percent of the cocaine traffic originates and nine agents in Miami assigned primarily to airport surveillance.

8. State and local law enforcement officials are not prepared to cope with international narcotics trafficking or its local offshoots. The Florida State Law Enforcement Department allocated 44 special agents to south Florida, approximately one-third of these investigators work on narcotics trafficking. This department also assigns personnel to the Interagency Narcotics Intelligence System, a five-agency task force which includes DEA and the three local agencies in Miami.

9. While cooperation between Federal and local authorities is generally adequate, the Federal agencies have no means of supplying needed money, men or materiel to supplement local efforts or support local law enforcement groups in court cases.

10. Intelligence activities are not sufficiently coordinated. While jurisdictional limits on local law

enforcement authorities compels them to turn over information to higher authorities, there is no reverse exchange. There have been instances of two agencies working independently on the same case.

11. Much of the cocaine smuggled into Florida passes through Miami International Airport. An airport interdiction program which began in May 1977 is constantly overwhelmed by the volume of passengers, aircraft and cargo. While the Ft. Lauderdale airport unit is relatively new, its interdiction rate is mounting steadily.

12. Accompanying the flood of narcotics into Florida, has been an influx of organized crime figures attracted by the enormous profits and minimal risks involved in trafficking.

13. Organized crime activities also include hidden interests in legitimate business covers. Organized crime officials are heavily involved in the service industries in Florida, the labor unions, the construction industry and every conceivable type of private business, particularly those with high cash receipts and low recordkeeping such as restaurants, banks, and legalized gambling operations for the laundering of cash.

14. The Organized Crime and Racketeering Strike Force is limited in its impact on narcotics prosecutions because its jurisdiction includes only cases involving known syndicate members or repeated trafficking patterns. Narcotics is but one of the priorities Washington assigns them. The strike force is also hampered by a lack of manpower. Its members can be tied up for a year or two in pursuing a single case.

15. A major impetus to continued narcotics trafficking in south Florida is the fact that Florida courts, including the U.S. District Courts, set bail and mete out sentences that are about 25 percent more lenient than in the rest of the country. Of the some 800 fugitives who left the jurisdiction after posting bond, more than half were under bail of less than $10,000.

16. The U.S. attorney in south Florida designated a few assistant U.S. attorneys to exclusively prosecute narcotics cases which usually involve complex conspiracies and large amounts of money.

17. There is a loophole in the law which prevents prosecution of persons possessing narcotics on the high seas unless the prosecutor can prove conspiracy to import into the territorial jurisdiction of the United States—a difficult, time-consuming case to develop.

18. It is obvious that the tremendous narcotics trade is adversely affecting the climate for legitimate business in south Florida. There is an enormous flow of cash into the Miami Federal Reserve District, probably as a result of narcotics trafficking. The excess of payments over receipts in Miami showed a 180-percent increase from 1970 to 1974. A chart comparing Miami to districts of the same size such as Cincinnati, Dallas, Houston, and St. Louis, showed that the proportion of payments to receipts in Miami is much higher than normal. Informed opinion is that cash drug transactions account for it.

19. The potential for corruption is self-evident, as traffickers launder their tremendous profits. Under Federal banking law, the Currency and Foreign Transactions Reporting Act of 1970, any deposit or

transfer in excess of $10,000 must be reported to IRS. False identification, courier use and bribery of bank officials help traffickers circumvent this law.

IV. CONCLUSIONS

1. Use of cocaine and marihuana in the United States has soared in the past decade. Cocaine traditionally comes from Latin American narcotics sources which usually involve complex conspiracies and large amounts of money.

2. South Florida has become the gateway to the United States for South American marihuana and cocaine because of geographic proximity.

3. Federal, State, and local law enforcement authorities are not equipped to interdict the tremendous flow of narcotics because their manpower and financial resources have not grown at the same rate as the traffic. DEA, Customs, the U.S. Coast Guard and all other law enforcement authorities are hampered by a lack of equipment, money and resources.

4. Drug traffickers earn enormous profits. They are able to operate with highly sophisticated equipment —jet aircraft, high-powered boats, ingenious container devices—which are far beyond the resources available to American law enforcement authorities.

5. Law enforcement authorities are stymied by a series of loopholes in the U.S. Code and in treaties with South American governments which prevent them from arresting and prosecuting persons possessing narcotics on the high seas.

6. Low bail and light sentences meted out by Florida courts do not deter drug traffickers.

7. Money laundering has become big business in south Florida, encouraging the infiltration of organized crime into legitimate businesses and disrupting the local economy.

8. The acceptance of marihuana as a recreational drug by millions of Americans and the reduction in penalties for its personal use in 11 States makes it more difficult to secure convictions for large scale marihuana smuggling.

9. The Federal Government must react to the situation in south Florida in the manner it would if a natural disaster or other grave emergency had struck the area.

* * *

THE WHITE HOUSE,
Washington, July 18, 1978.

DRUG TRAFFICKING IN THE SOUTHEASTERN UNITED STATES

There is growing concern over the illegal drug trafficking in marihuana and cocaine into and through Florida and other States along the Eastern seaboard and Gulf Coast. Originating in South American and Caribbean countries, huge quantities of marihuana are being smuggled by sea and air into the United States. Statistics indicate that over 2.5 million pounds have been seized through May of this fiscal year compared

to less than 950,000 pounds during the same period last year. Seizure of multi-ton loads is commonplace. The amount of cocaine seized also has increased significantly. Federal, State and local law enforcement agencies and prosecutors in Florida report being overloaded with pending drug cases.

The U.S. economy is directly affected by the hundreds of millions of dollars paid to the sources of the drugs. The financial dealings connected with the illegal drug traffic through South Florida alone are estimated at several billion dollars a year. It is reported that corporations, sponsored by illegal drug profits, have been set up to purchase businesses to provide the mechanism for placing the illegal profits back into legitimate channels. The potential for major expansion of organized crime and for all forms of corruption is obvious.

The Executive Branch, the Congress, and State and local officials have indicated concern over this situation. To provide an effective and timely response, a White House review has been initiated under the direction of Dr. Peter Bourne, Special Assistant to the President. The principal Federal agencies involved (DEA, Customs, Coast Guard, and the State Department) are participating in the review.

The initial intent is to develop a more comprehensive response to this situation which capitalizes on the full capabilities of the Federal, State and local law enforcement authorities. Investigations are targeting on the illegitimate profit associated with the traffic and the effect of these large amounts of money on business and government. There will be a continuing emphasis on seeking longer

term solutions through legislative, judicial and diplomatic initiatives.

The preliminary actions which have been initiated or are planned are based on attacking the entire chain. All Federal capabilities for air and sea surveillance are being reviewed for potential support of the antismuggling effort. The State Department will coordinate with foreign governments. Special joint law enforcement operations are being planned. The Federal agencies will open new offices in areas which are not currently covered. Support of State and local law enforcement will be expanded.

In addition to these initiatives, the President has approved and will submit to the Congress a reorganization proposal which will create a new Border Management Agency to provide more effective inspection upon entry and to strengthen the patrolling activities along the borders. The new Border Management Agency will also be tasked to prepare a comprehensive maritime and air interdiction strategy in cooperation with other Federal agencies.

The following actions have been initiated or are planned in response to the need to stem the growing drug traffic in the Southeastern United States. Legislative needs are included. The White House review team will continue to monitor the situation, coordinate the effort and provide follow-up recommendations.

I. SOURCE AND TRANSIT COUNTRIES

An intensive assessment of the drug sources and traffic routes has been initiated by the interagency

narcotics intelligence committee. This report will address the South American and Central American countries, as well as the Caribbean and will be completed in mid-July.

Customs will conduct an intensified operation in the Virgin Islands in the near future. DEA has scheduled a seminar on conspiracy investigation in October 1978 for law enforcement officials in the Virgin Islands.

A Department of Justice team will travel to Colombia to discuss how Colombian nationals can be prosecuted under Colombian law either in the United States or Colombia if it can be shown directly or indirectly that they possess or have facilitated the possession of huge sums of money, largely using international banking facilities, where the assets can be directly linked with illicit drug trafficking.

The team will also discuss twelve cases where major Colombian traffickers are currently under indictment in the United States or scheduled for indictment in the near future. The Colombian Attorney General has indicated that he will prosecute these violators in Colombia if presented with sufficient evidence.

A proposal is under study which would turn over approximately twelve small ships (previously seized by U.S. authorities) to the Government of the Bahamas for maritime drug enforcement.

A Coast Guard and Customs team visited Colombia in May 1978 to evaluate and develop increased Colombian cooperation in coastal maritime interdiction. As a result of this visit, assistance is being furnished to the

Colombians in developing an effective maritime drug interdiction force and for establishing a mutually beneficial exchange of intelligence information. An orientation visit to the United States by the Commandant of the Colombian Coast Guard is planned for this fall. A Colombian naval officer will accompany a U.S. Coast Guard interdiction patrol in the near future to observe our patrol strategy.

The U.S. delegation to the current General Assembly of the Organization of American States (OAS) is pressing for general recognition of drug trafficking as a hemisphere-wide problem requiring cooperative action by OAS members.

The Colombian Government will be encouraged to take aggressive steps to discourage the growth of marihuana.

II. FLORIDA

DEA, Customs and the Coast Guard will expand their cooperation, coordination, intelligence exchange, and training activities with State and local law enforcement officials in the Florida area. Specific coordination responsibilities will be assigned and an expanded drug training effort will begin in late summer of 1978.

DEA has detailed 15 additional special agents to Florida to assist in handling the heavy case load and to assist in developing conspiracy cases.

DEA will open new offices in Panama City and Ft. Meyers, Florida and increase the permanent staff in Miami.

Customs will open a patrol station in Ft. Meyers and increase staffing at Key West and Ft. Lauderdale. New patrol stations at Crystal River and Ft. Pierce are under consideration.

A Currency Investigation Task Force is being formed in Miami by Customs. This group of investigators will seek to expand upon violations of the Bank Secrecy Act, applying them in concert with other violations of Customs statutes, and laws enforced by Customs. The group will coordinate with the DEA in all violations of the currency laws that involve smuggling or trafficking in narcotics.

The trend toward low bail and low sentencing in South Florida is a significant factor in reducing the deterrent effect of arrest and conviction. An example given was that of 73 defendants released on bond, only eight reappeared to be tried and sentenced, and these eight are now fugitives. The Attorney General has been informed of this problem and asked to take action to encourage more aggressive bail and sentencing policies. Steps are being taken to ensure that adequate information is furnished to the judges so that appropriate bail is set and adequate sentences are meted out.

DEA and the FBI established a joint task force in Miami in October 1977 to investigate the financial aspects of drug trafficking and the use of U.S. banks to facilitate payments for drug shipments. This investigation includes the manner in which illegal drug profits are converted

into apparently legitimate monetary transactions. More arrests are expected as this program continues.

DEA will continue to participate in the Federal/State and local task force in Orlando, Fla.

DEA is finalizing negotiations with the Florida Department of Criminal Law Enforcement regarding the possibility of that agency serving as a statewide clearinghouse for information and an interface with the El Paso Intelligence Center (EPIC) for other non-Federal agencies within the State. DEA is negotiating similar initiatives with Georgia and South Carolina.

III. MARITIME AND AIR

Discussions have begun with DOD to determine the feasibility of increased involvement of U.S. military resources, in conjunction with normal National Defense missions, to assist in surveillance and communications support of Federal law enforcement efforts against drug traffickers penetrating our sea and air borders.

Coast Guard maritime drug interdiction efforts will be increased in proximity to Florida coastal areas, through expanded WPB class vessel patrols, participation of small utility boats in coastal anti-drug activity, and increased surveillance by major surface and air units.

On June 21, the Navy agreed to a Coast Guard request that Navy vessels would report sightings of known or suspected drug smuggling vessels to the Coast Guard. This activity is part of the normal Navy

maritime surveillance and is not to interfere with normal Navy operations.

DEA, Customs and Coast Guard will plan special operations for early fall 1978.

The Coast Guard will continue to support DEA and Customs with available drug interdiction resources, both surface and air.

Customs has been negotiating with DOD to furnish four T-39 jet aircraft for the Customs air interdiction program. While DOD has indicated agreement to the long term loan of these aircraft, it will require at least another 18 months to modify them with suitable radar and sensor equipment. Discussions will be undertaken with DOD to determine if suitably equipped aircraft could be loaned to Customs on a short term basis until the T-39's are modified and available for use.

IV. OTHER ACTIONS

The Attorney General has been asked to give special consideration to requests for LEAA grants which have the potential for significant impact on the drug trafficking originating in or transiting the Caribbean area. Particularly useful would be funding assistance to the Florida Statewide Grand Jury and to other prosecutorial areas. On June 30, the Attorney General announced award of a $360,000 grant in support of a Joint Organized Crime Investigation Program requested by the Dade County Department of Public Safety in Florida.

The Coast Guard is expanding, in coordination with Customs, their PADIE (Prevention and Detection

of Illegal Entry) program. This program was created for National Security purposes to detect and deter smuggling and illegal entry into the United States from the sea. It should help solve one of the major problems—the lack of capability to monitor the vast coastline vulunerable to smuggling operations.

"PADIE" provides an organized way to make use of all agencies, organizations and individuals in reporting any unusual activity taking place along the waterfront or beach. It has significant potential for collection of information on smuggling when coordinated with similar ongoing activities of Customs.

Coordination at the Federal level between the U.S. attorneys and DEA is being increased. In addition, the staff of the U.S. attorneys has been augmented by temporary assignment of three attorneys from the Narcotic and Dangerous Drug Section of the Criminal Division of the Department of Justice, and additional assignments are under consideration. The Executive Office of the U.S. attorneys is reviewing the possible assignment of additional Federal prosecutors to Miami and Puerto Rico.

White House representatives will discuss the proposed initiatives with the Governor of Florida and other officials to ensure that the efforts of the Federal Government and the State government are working in concert to reduce drug traffic into and through their jurisdictions.

The White House review team will continue to monitor, coordinate and follow-up on these initiatives.

V. LEGISLATIVE INITIATIVES

On June 12, 1978, the Department of Justice sent to Congress the "Controlled Substances Seizure and Forfeiture Act of 1978". This proposal would: (1) provide for the forfeiture of proceeds and funds used or intended for use in connection with a violation of the Controlled Substances Act; (2) require the reporting of monetary instruments leaving the United States, or intended to do so; (3) require the prompt reporting of vessels carrying foreign cargo arriving in the United States; and (4) increase the administrative forfeiture amount from $2,500 to $10,000. Early passage of this proposed legislation will greatly facilitate the ability of Federal agencies to attack the economic base supporting the illegal drug traffic.

Current legislation does not allow the arrest of a person on board a U.S. vessel on the high seas or a U.S. citizen on board a foreign vessel on the high seas who is in possession of large amounts of illegal drugs. The administration is currently preparing comments on H.R. 10371, which will amend the Controlled Substances Act. A pending amendment to the Criminal Code Reform (S. 1437) also addresses this issue. The administration will support enactment of legislation to strengthen enforcement activities in this area.

Other proposals are under study.

VII. POSTSCRIPT

The White House in responding to the committee's concern has planned a comprehensive attack on the Southeastern United States drug trade.

The committee has been impressed with the timely and thorough nature of the report submitted by the White House, and looks forward to the significant achievements this plan proposes on both domestic and international fronts.

The committee will continue as its mandate requires to monitor the effectiveness of the Federal enforcement effort. The committee pledges to do everything it can to relieve this problem and to discourage smugglers by tightening law enforcement efforts in Florida to the point that trafficking will no longer be as profitable as it is today.

The committee regards its activities in south Florida as an example of the results that can be obtained where the public is alerted to the problem and such exposure is coupled with prompt and effective action by the executive and legislative branches.

THE MIAMI HERALD Thursday, Jan. 10, 1980

3 of 4 Murder Victims Used Cocaine

Three of the four men left dead in a car along I-95 in North Dade Tuesday had been using cocaine, a deputy Dade County medical examiner said Wednesday.

That finding, the result of blood tests, tended to support police statements that the murder victims had been involved in some kind of narcotics dealings.

Still uncertain was the amount of cocaine the three had ingested. Dr. Donna Brown, in charge of the medical investigation, said an attempt to determine that would be made in further laboratory testing.

* * *

THE MIAMI HERALD Wednesday, Jan. 9, 1980

4 Men Slain, Left in Car; Drug Links Suspected

4 Men Slain, Left in Car Beside I-95

Four men were stabbed and beaten Tuesday morning before their bodies were stuffed into a car that their killers parked on an expressway ramp and tried to set on fire, investigators said.

Metro homicide Detective Steve McElveen said the men seemed to have one thing in common: "Dealing in narcotics."

Their bodies were found at 4:55 a.m. at a ramp of Interstate 95 at Miami Gardens Drive (NW 186th Street), but police don't know where one was shot and all were bound with tape, stabbed, beaten and choked.

There are no suspects.

* * *

THE MIAMI HERALD Thursday, Dec. 27, 1979

Miami's Murder Rate Up 41 Per Cent

Miami's murder rate rose 41 per cent through the first nine months of 1979 over the same period in 1978. Rape jumped 42 per cent, and robbery increased 18 per cent.

Despite the growth in those crimes, the increase over-all in major crime in Miami was not as great as it was in Tampa or St. Petersburg, both of which topped the nationwide 9 per cent over-all increase, according to FBI figures.

Major crimes—murder, forcible rape, robbery, aggravated assault, burglary, larceny and motor-vehicle theft—increased 6 per cent in Miami through September.

There were 95 murders reported in the city of Miami through September. Last year, during that same period, there were 67.

St. Petersburg reported 26 murders in the first nine months of this year, compared to 20 through September 1978. Orlando had nine murders during that period in 1978, and 13 this year.

But in two other Florida cities, the number of murders declined. In Jacksonville, there were 53, five less than in the first nine of 1978. Tampa reported 32 last year, 27 this year.

LOCAL POLICE officials say one reason Miami's murder rate is soaring is the drug wars.

"We've had a large increase in murders due to narcotics," said Miami police spokesman Harry Cunill.

* * *

Reported crime increased at a faster rate in the South than other regions of the country in all of the major-crime categories except larceny.

Saturday, Dec. 15, 1979 THE MIAMI HERALD

IRS Admits Efforts Reduced On Drug-Related Tax Cases

WASHINGTON—The Internal Revenue Service is paying far less attention to drug-related tax cases despite its estimate that drug dealers may gross $40 billion annually, IRS officials admitted Friday.

IRS Commissioner Jerome Kurtz also conceded that during this period there has been a precipitous drop in the number of convictions won by IRS agents against narcotics traffickers who fail to report their incomes.

This decline came during a period when other federal agencies were being overwhelmed by the exploding growth of the illegal drug trade.

These facts emerged Friday during the sixth day of hearings before the Senate Permanent Subcommittee

on Investigations. The subcommittee is looking into the economic impact of the narcotics business and the inability of law enforcement agencies to stem its growth.

Much of the testimony from law enforcement officials and former IRS agents has been critical of the IRS for its alleged unwillingness to cooperate in drug investigations by providing information about suspects' income taxes.

"The problem," Sen. Lawton Chiles (D., Fla.) said angrily during the hearing, "is that the only way to go after [drug profiteers] is to go after their money.

* * *

Kurtz insisted that while the number of agents assigned to drug cases has dropped in five years, the lowest point was reached in 1976. Since then, he said, the IRS has steadily added agents in this area.

He said the IRS is working "very extensively" in Florida to catch drug profiteers.

"I suppose I can't say that we're winning the battle," Kurtz said. "But we're in there fighting it."

Saturday, Dec. 15, 1979 THE MIAMI HERALD

Lawmen to Halt Unsafe Dope Planes

Law enforcement and aviation officials united this week in a concerted effort to ground airplanes that are dangerously modified for long-haul drug runs.

The Federal Aviation Administration, concerned about growing numbers of unsafe airplanes and the crash Sept. 23 of a suspected drug plane into a Miramar house, held a secret meeting Tuesday night with airport operators and representatives of 10 area law enforcement agencies.

* * *

Saturday, Dec. 15, 1979 THE MIAMI HERALD

Miami Cop Charged As Middleman In Marijuana Deal

A city of Miami patrolman acted as a middleman in a 30-pound marijuana deal, according to charges filed by the State Attorney's Office.

Patrolman Orlando Martin, 26, surrendered at the county jail late Thursday after he was charged with possession with intent to sell or deliver marijuana, a felony. Martin, who was relieved of duty Nov. 20, was released on a personal recognizance bond.

Also charged with possessing the marijuana was Rigoberto Varona, 37, of 3081 SW 27th Ave., Miami, according to a charge filed by prosecutor Martin Jaffe.

In a series of telephone conversations and meetings, Martin arranged for confidential informant Jorge Diaz to deliver the 30 pounds of marijuana to Varona, according to an affidavit filed in Circuit Court.

Martin told Diaz that he could settle an argument about a drug rip-off by leaving the marijuana about 2 a.m. Nov. 20 in a car parked near NW Seventh Street and 37th Avenue. The patrolman told Diaz that Varona would take the pot from the car.

Diaz delivered the marijuana, investigators said. At about 2:47 a.m. Nov. 20, while Miami police internal affairs investigators watched, Varona appeared at the parking lot and took the marijuana, they added.

THE MIAMI HERALD Friday, December 14, 1979

Drug Dollars a Hard Habit to Shake

CHARLES
WHITED

Every now and then in this town we catch a glimpse of the monster's tentacles. And we're reminded afresh of a pervasive nemesis that affects, in multiple and silent ways, the lives of us all.

The drug colossus.

It's bad enough for our area to be plastered with a reputation as America's dope-smuggling capital. With $7 billion worth of junk pouring in annually, three-fourths of it through South Florida, the label is certainly appropriate.

IN TERMS of actual drug use, however, only a fraction stops here. The great bulk goes to feed America's raging habit. And today's sophisticated drug distribution system reaches not only the big cities but also every jerkwater town big enough to have a junior high.

So South Florida's drug problem is a national problem.

And those bizarre local side effects of proliferating drug traffic, spawned from mind-boggling profits in loose and spilling cash, are a national problem, too. It just so happens that we're the people who have to live with them.

The corruptive impact of so much cash pouring through a community has got to be enormous. We see only the tip of it. The real depth of it, the breadth of it, the consuming corrosiveness of it, can only be surmised.

But evidence surfaces dramatically at times.

The ongoing trial this week of the Black Tuna Gang, with its recital of alleged plots to bribe jurors and murder a key witness and even the federal judge, is a measure of cynical disregard for law, for order, for life itself. For a gang accused of smuggling $300 million worth of dope, a million to sandbag a trial is pocket change.

LATELY, TOO, have come other revelations that hint at the enormity of drugwork in South Florida.

Isolated cases of police corruption are part of it; but cops on the take are small potatoes, nickel-and-dime casualties in a war of uncertain moralities. The massive, complex pressures on police today are so great that the wonder is so few surrender to opportunity.

After all, who can blame the modestly paid cop for being less than perfect when the banker, that pillar of rectitude and material respectability, looks the other way? Some Miami banks, we're told, are glutted with drug cash. And the bankers know it.

Who can blame the cop, for that matter, when some of our eminent lawyers turn huge fees shielding and defending drug traffickers, knowing damn well where those fees come from? Is justice really that blind?

And then there are those businessmen who get pieces of the drug action, selling at inflated prices such equipment as aircraft and boats for the trade.

Real-estate analyst Charles Kimball said it to a U.S. Senate subcommittee this week. Crime pumped $192 million into Dade and Broward real estate in just six months. Two-thirds of it was drug profit. Result: an added layer of inflation. It boosts the average home cost by $2,000.

So the monster feeds.

In olden days, you killed a monster by chopping off his head.

But first you had to find it.

Thursday, Dec. 13, 1979 THE MIAMI HERALD

3 Find 55 Pounds of Cocaine

Three teenagers on horseback discovered a duffel bag stuffed with about 55 pounds of cocaine, worth an estimated $2 million on the wholesale market, Sunrise police reported Tuesday.

The cocaine probably was part of the same drop of the illegal drug that wound up on the lawn of a Sunrise home last week, police said.

"It has all the earmarks of the drop that happened a week prior," said Capt. Edward DiPaola. "The same quantity, the same duffel bag, the same markings on the bag."

The teenagers found the cocaine Saturday as they were riding horses at the J & W Ranch at NW 17th Street and Flamingo Road, DiPaola said.

The cocoa-brown duffel bag was partially submerged in the marshy waters of the area, he said. The teenagers turned the bag over to the ranch owner, who gave it to police, he said.

On Dec. 3, a duffel bag with a similar amount of cocaine came tumbling from an airplane or helicopter onto a lawn at 2980 NW 120th Way, Sunrise.

THE MIAMI HERALD Thursday, Dec. 13, 1979

Analyst: Drug Cash Sends House Prices Higher

WASHINGTON—The cost of the average home in South Florida is inflated by $2,000 because of a massive infusion of drug-related cash into the regional economy, the Senate Investigations Subcommittee was told this week.

Criminal organizations, operating through foreign front corporations often based in the Netherlands Antilles and Panama, have created this "artificial economy" by pumping an estimated $192 million into Dade and Broward real estate in the first six months of this year, according to the testimony.

"Of this, it is reasonable to presume that at least two-thirds [of $192 million] can be directly attributable to the affluence generated by . . . narcotics," Miami real-estate consultant Charles Kimball told the panel Tuesday.

KIMBALL SAID the willingness of criminal investors to pay above-market prices for real estate has driven prices "sharply upward," especially for luxury condominiums, apartments and shopping centers.

In answer to a question later, he predicted that if the present trend continues for 20 years, these investors will corner the market and own virtually all investment real estate in South Florida.

"The ultimate aim of organized-crime investors is to acquire monopolistic control of various real-estate markets," he said.

Kimball's testimony came during the third day of hearings by the subcommittee into the illicit drug trade. Witnesses Tuesday—including Florida Attorney General Jim Smith and Department of Criminal Law Enforcement chief James York—focused on the boats to cash-paying smugglers at prices "they know to be unreasonable."

Kimball, a columnist for The Herald and real-estate consultant to law-enforcement agencies, said he recently had done a survey of tax-sheltered investment activities.

The purpose of the survey was to determine the amount of money invested in Florida by foreign corporations that were "in some way tainted by criminal activity," he said

Kimball said that of 351 major real-estate purchases by foreign investors in the first six months of this year, 139 were by foreign tax shelters linked to organized crime. Kimball said about 75 per cent—or about $192.1 million—of the investments involved criminals.

When these investments are added to the Florida holdings of known organized-crime figures, $2.5 billion worth of real-estate transactions in the state last year resulted from criminal acivity, Kimball said.

All agreed with U.S. Treasury Department estimates that $7 billion in drug transactions took place last year, making narcotics Florida's major industry, outstripping tourism and agriculture.

"AT WHAT POINT, does this [money] become ingrained into the economy that people aren't willing anymore to participate in law enforcement?" asked Sen. Lawton Chiles of Florida midway through the hearing.

York said that in recent months many legitimate businesses have allowed themselves to become "morally corrupted" by selling such products as aircraft . . .

THE MIAMI HERALD Friday, November 16, 1979

Drugs — Colombia's Indignity

Home of Cocaine Cowboys

Can Colombia Ever Eliminate Drugs?

BARRANQUILLA, Colombia—This country of mountains and jungles and beaches is the home of Miami's Cocaine Cowboys. Colombians call them "mafiosos." They terrorize cafes with magnum revolvers. They fuel inflation and corrupt politicians with the millions they make off cocaine and marijuana.

It may be too late for the government, which finally decided it had enough, to stop them.

For drug smuggling is a bigger-than-ever business: Farmers are growing 70 million pounds of marijuana this year. Smugglers have bought friends in high places. Colombian laws are inadequate to deal with it. And government troops are ill-equipped.

AT STAKE, in the words of Brig. Gen. Jose Villareal, the army field commander against the smugglers, is nothing less than "the national morale, the national dignity."

* * *

Thursday, Nov. 8, 1979 THE MIAMI HERALD

Region Gets 61.2% of Seizures

Miami Still 'Cocaine Capital'

By JOE OGLESBY
Herald Staff Writer

Miami's image as a cocaine mecca remains intact—at least for another year.

U.S. Customs officials reported Wednesday that the Miami region accounted for 61.2 per cent of all the cocaine seized by Customs in the entire country.

A lot of marijuana was seized here too: 70.4 per cent of the nation's total. But that was lower than the 86.9 per cent total the area accounted for in 1977-78.

The Miami region would place even higher if the record keepers had counted two major seizures last month.

Seizures of 329 pounds of cocaine in Fort Lauderdale and 484 pounds in Tampa in late October weren't counted in this year's figures because Customs' fiscal year runs from Oct. 1 to Sept. 30.

"WITH THOSE 713 pounds, maybe things will be downhill from now on," said spokesman Jim Dingfelder.

The 61.2 per cent cocaine seizure for the Miami area represented 857.3 pounds. Nationwide, 1,408.5 pounds of cocaine was taken by Customs.

Confiscated marijuana for the area weighed in at 2,523,737 pounds.

* * *

THE MIAMI HERALD Saturday, October 13, 1979

Largest Cocaine Cache Seized in Car

By ANDERS GYLLENHAAL
Herald Staff Writer

In the biggest cocaine seizure in U.S. history, federal agents Friday found 329 pounds of cocaine in a parked car near Broward's Everglades.

Acting on an informant's tip, U.S. Customs agents found the cocaine stuffed in four duffel bags in a car abandoned just off State Road 84.

The smugglers had fled.

AUTHORITIES said they have suspects and expect to make arrests after an investigation that may take several weeks and lead to a large-scale ring.

If the drug is as pure as initial tests indicate, it has a street value of about $85 million, federal Drug Enforcement Administration (DEA) agents said.

* * *

THE MIAMI HERALD Friday, Sept. 7, 1979

Drug Cash Tied To State Banks

Drug Profits Tied To Cash in Florida

By TOM FIEDLER
And MARTIN MERZER
Herald Staff Writers

Billions of dollars, mostly in $20 and $100 bills, are flowing into Florida banks in patterns that often suggest drug-smuggling profits, federal officials said Thursday.

The Treasury Department, trying to help identify drug smugglers, said it will crack down on the reporting of cash transactions by banks in Florida and elsewhere.

Figures compiled in a Treasury report "clearly indicate that unusually large volumes of currency are flowing into Florida from other states and perhaps from other countries," the department said.

The study found that during 1978 Federal Reserve branches in Miami and Jacksonville had surplus cash deposits of $3.2 billion — a sharp contrast to the experience of other branches in which there was a $10-billion cash deficit.

* * *

THE MIAMI HERALD Sunday, August 19, 1979

CHARLES WHITED

Best Cops Have Reasons to Quit —And They Do

Dave Green grew up in Dade County. Twenty years ago, he became a Metro cop. He worked the past decade in the Organized Crime Bureau, chasing racketeers, illegal gamblers, white-collar hoods.

At age 40, Green was a sergeant. With overtime, he earned around $25,000 a year. A man with so much street savvy, experience and contacts is part of the backbone of any police agency.

Dave Green quit.

FOR STARTERS, the salary doesn't go far when you've got two growing children to provide for and educate.

But even more important, police work has changed.

"Things have gotten to the point where it's hard to function any more," Dave Green said. "I'm fed up with it."

He speaks for a multitude. Today, many experienced officers are quitting in South Florida, or thinking about it, with eight, 10 or 15 years on the job. Cops on vacation are looking for jobs.

There are multiple reasons.

The threat of a Metro tax revolt next month, cutting county funds to the bone, has sapped county police morale. Some 350 police jobs would be erased. There would be numerous budgetary demotions.

Police also are defensive over brutality exposes, public second-guessing of action in the heat of street combat, the firing of Sheriff E. Wilson Purdy.

AT THE CITY of Miami Police Department, American-born white cops with time in service feel blocked from promotion by recent court mandates that blacks and Latins be moved into the upper command.

Stationhouse frustrations over the criminal-justice system range from release of felons on low bonds—or no bonds—to plea bargaining and judicial leniency in white-collar crimes.

Bad guys go free, time after time, on technicalities.

Amid all this, there is the wooing of experienced police by other agencies, both public and private, at better wages. This week's disclosure that Houston, Tex., will hire 50 to 100 additional officers—and is looking to Dade County for applicants—is an example.

Dave Green is among those going into private security work. He talked of his discontents in a lengthy taped interview with Herald Investigations Editor James Savage.

GREEN SEES:

- Crime flourishing in a South Florida that attracts every illegal activity from narcotics to book-making and street assault. "We're a haven for every crud in the United States."

- Street policemen reluctant to move aggressively in confrontations, for fear of being accused of overreacting or brutality. "When police are constantly criticized, the community suffers. You force them [police] to be more careful by doing less.

- The potential for disaster if voters next month do approve the radical cut of Metro taxes. "It scares me to think of what this area will be like. My advice to people will be to move."

"IF YOU LINED them all up from the Courthouse, how far would the line stretch? To Maine?"

And for the police officer there is the never-ending pressure, the donning of the bulletproof vest, the combat mentality, the threat of lawsuit and repercussion. In a way, Green is glad it's over for him.

"It's not worth it. The salary isn't high enough, the danger is too great, the pressures too severe. Whatever you do, you risk being criticized. Every day, you have these problems, these pressures . . . . It's ridiculous for anyone to want to be a police officer. It's a stupid job. If you want excitement, sky-dive."

But then:

"I've loved the job. I never thought I'd live through the whole career.

"Now I wake up every night regretting that I quit."

Thursday, August 9, 1979 THE MIAMI HERALD

'Cocaine Cowboys' Hide Out in Suburbia
'Cowboys' Flashy But Secretive

By EDNA BUCHANAN
Herald Staff Writer

The garages and driveways of their middle- and upper-class multibedroom pool homes are crowded with expensive cars, trucks and motorcycles. But when they want to go somewhere, they call a Yellow Cab.

They pay rents of as much as $1,400 a month, in cash, in advance, yet their housekeeping is a mess.

And if, like one friendly Kendall housewife, you bake a batch of cookies to welcome your new neighbors, chances are they won't open the door.

THEY ARE more interested in cocaine than cookies.

The truck parked in their swank suburban garage is more likely to be an armored war wagon than a station wagon.

They are Colombia's cocaine cowboys and they are hiding out in more than 100 nice houses in nice Dade residential areas with nice neighbors. The neighbors are so nice, they don't call police when they notice the newcomers' peculiarities.

The owners of the houses and the real-estate agents who arrange to lease a client four or five homes at a time don't complain. The profits are too good.

Wednesday, police called it "apathy and greed."

"We've got to get the public's help," Metro Homicide Detective William Bellerdine said.

Police fear the next machine gun shootout—like the one that killed two men and wounded two bystanders at Dadeland last month or the one that sprayed a South Dade intersection with gunfire in April—may be in a nice residential neighborhood and the bystanders may be the neighbors or their children.

* * *

Thursday, July 12, 1979 THE MIAMI HERALD

Dadeland Rocked in Drug War

Killers Spray Dadeland; Two Shoppers Are Killed

Assassins Open Fire In Store

Submachine Guns Used to Kill 2

By EDNA BUCHANAN
Herald Staff Writer

The most violent outburst in South Florida's drug war rocked Dadeland Mall Wednesday afternoon as killers in an armored "war wagon" assassinated two shoppers and wounded two employes in a liquor store, then escaped.

The three gunmen apparently had been stalking their victims. They made no attempt to rob Crown Liquors, at the southwest corner of the busy mall. Both victims and killers were Latin, police said.

Women and children ran for cover as high-powered submachine-gun slugs shattered plate glass, slammed into parked cars and spilled gasoline from riddled fuel tanks into the parking lot.

"It's the cocaine cowboys," one Metro police officer said.

"I have never seen a shootout like this in my life," Assistant Dade County Medical Examiner Charles Diggs said. "This is another Chicago.

"THEY LOOKED like Swiss cheese," Dr. Diggs said. "I started counting bullet holes in one of them—and gave up."

One of the dead men was a Colombian, police said. Their identity was uncertain Wednesday night.

Almost weekly murders and shootouts involving drug-trafficking Colombian nationals have brought unprecedented violence to Dade County this year. Submachinegun battles at busy intersections and at shopping centers had somehow spared bystanders—until Wednesday.

"This is the first time that innocent people have been hurt," Metro Homicide Lt. Robert Willis said. "We've only gone this long by the grace of God."

* * *

Death Machine Drove Killers to the Scene

By EDNA BUCHANAN
Herald Staff Writer

The "war wagon" that carried three killers to Dadeland Mall Wednesday was an efficiently equipped death machine.

The Ford van stunned police who said they wished that they were as well equipped. The van was abandoned with the keys in the ignition, the motor running and the driver's door hanging open.

Armor plate reinforced the sides, the side windows were one-way, wooden dowels converted to gun ports through which shotguns and carbines could be fired.

"They had their own SWAT truck," one astonished officer said.

* * *

THE MIAMI HERALD Sunday, July 8, 1979

Shoot-Out at the Cocaine Corral

Casualty List Grows in S. Florida Drug War

By CARL HIAASEN
And AL MESSERSCHMIDT
Herald Staff Writers

Someone murdered Ruben Echeverria and Julio Gaona, stuffed them in a cardboard box and dumped them in the Everglades.

A nighttime visitor executed importer Bertie Diaz in his Coral Gables office.

Considerate assassins delivered moribund Oscar Alvarez to the emergency room of Baptist Hospital in a new white Cadillac.

Such are the shoot-outs at South Florida's cocaine corral. Killers empty submachineguns in daylight assassinations, chuck well-dressed victims into empty lots and disappear into an invisible underground where Spanish is the idiom, money the motive and cocaine the king.

The Cocaine Wars of '79 have brought unprecedented drug violence to South Florida and unprecedented frustration to South Florida lawmen.

"South of Broward County, we're not in the United States anymore," says Assistant U.S. Attorney Jerry Sanford. "It's Dodge City all over again."

Drug dealers are dying at the rate of more than one a week. Of the 150 murders committed in Dade County in the first half of 1979, at least 35 have been linked by police to the drug trade. The majority of those involve cocaine trafficking.

"It's Murder Inc.," mutters Metro detective Chuck Majors.

"A replay of Chicago in the 1920s," declares Dr. Ronald Wright, deputy medical examiner for Dade County.

Some police blame territorial wars for the violence. Others say the increase in drug murders can be traced to ripoffs between dealers.

On both sides of the crossfire are Colombian nationals entering the country illegally and submerging into the camps of four, possibly five major Colombian coke organizations now operating in South Florida.

Two of the groups are headed by women, one a 27-year-old Colombian whose bodyguard is her sister. Police will not release her name, but they describe her as striking—both physically and literally.

A well-financed underworld pipeline feeds Colombians into the United States in a steady flow.

"If I had a thousand men lined up on the beach holding hands I still couldn't stop them," says William Metcalf, chief investigator for the U.S. Immigration and Naturalization Service (INS).

Armed with silencer-equipped submachineguns, loaded with cash and shielded by multiple identities, the shadow figures of Miami's coke world operate with impunity, police say.

* * *

The Victims of South Florida's Drug Murders

Here is a list of some of the drug-related murders that have made 1979 the bloodiest in South Florida's history:

Jan. 7

An airplane pilot making touch-and-go landings at a South Dade airfield spotted the body of Dario DeJesus Flores, 27, an illegal Colombian alien with a cocaine record in New York. He had been shot in the head and torso with a .38-caliber revolver. Status: Unsolved.

Jan. 9

Shawn Crowder, 38, 4990 NW 79th Ave., ran a paint and body shop, dealt marijuana and Quaaludes, and owed money. Ninety minutes after his girl friend saw him leave his apartment, residents near SW 112th Street and 138th Avenue heard gunfire. Status: Unsolved.

Jan. 12

Carlo Oxemendi, a piano player at The Hasta disco, owed $100. Witnesses said it was a drug debt. His creditor blasted him in the stomach with a shotgun at the restaurant. Oxemendi died two weeks later. His killer, Clobaldo Rafael Sosa, was himself shot in the abdomen over a coke deal at the El Baturro Restaurant. Sosa lingered until Feb. 22. Status: His murderer has not been caught.

Jan. 17

John W. Johnson, 35, took off his clothes and climbed into the bathtub at his apartment at 18200 NW 43rd St. There, his killer shot him in the head. Police say Johnson was a known drug dealer in Coconut Grove. Status: Unsolved.

Jan. 18

Robert E. Johnson, 33, of 2318 W. Fifth Way in Hialeah, got into an argument during the sale of a kilo of cocaine. He was shot to death. Status: Metro homicide detectives have charged a suspect with first-degree murder.

Jan. 18

A target shooter, tramping off Tamiami Trail 26 miles west of Krome Avenue, found a big cardboard box used for shipping a Zenith television set. Inside were 35-year-old Ruben Echeverria and Julio Gaona, 31, both dead of multiple gunshot wounds. Both were identified from Colombian passports. Status: Unsolved.

* * *

THE MIAMI HERALD Friday, July 6, 1979

Langer Wants Out

Langer Says Miami's Drug City

Center Jim Langer, concerned about his family, the educational system, the drug situation and the fans in South Florida, said he'll play for the Dolphins in 1979, but plans to retire from pro football if he can't play for the Minnesota Vikings in 1980.

Currently, Langer has a home in Royalton, Minn., a community of 500 along the Mississippi River in the central part of the state. His children are ages 10, eight, three and six months, and he's concerned about them.

"I don't think living in an area which is No. 1 in the country in importing drugs is a good thing," Langer said by phone from Royalton Thursday. "It breeds a lot of crime. Ultimately, a lot of kids grow up perfectly normal. But that is not the kind of situation I feel comfortable in; I worry about my kids.

"A lot of people are making big money on drugs there. I just don't like the atmosphere. Drugs are too readily available and too lightly taken. This is something I've been considering for a long time."

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CR NO. 81-88-K

UNITED STATES OF AMERICA

v.

JOHN H. REGAN

June 30, 1981
Memorandum

Defendant's Motion to Suppress came on for hearing on June 5, 1981. Evidence was taken on June 5, 8, and 10. The parties elected to rely on their previous written submission and the matter was taken under advisement.

I.

At the hearing defendant called eleven witnesses (one of whom was recalled); the government called two. On the basis of the testimony of these witnesses and the four exhibits, I find as follows:

On March 18, 1981 at about 12:45 p.m., defendant and a male companion entered Delta Airlines Terminal at the Fort Lauderdale Airport. Defendant was on crutches and carried a small dark brown leather bag; the other man carried a larger brown vinyl suitcase. Defendant and companion walked to the Delta ticket-purchase counter, where they assumed a position in a short line.

Defendant aroused the interest of two Broward County Deputy Sheriffs, Thomas Brennan and James Carl, who were conducting narcotics surveillance in the terminal at the time. Except for several minutes when defendant left their sight, Brennan and/or Carl observed defendant from the time he and his companion entered the Delta terminal until defendant boarded his plane; a total period of about 15 minutes. Brennan and Carl had had no prior information concerning defendant, had never seen him before March 18, 1981, and found nothing unusual about defendant's personal appearance or clothing.

Brennan and Carl testified that defendant "kept looking around" and glancing behind him in the line, appeared to be "overly nervous," and that his behavior differed from that of the typical "nervous" airline traveller who tends to focus on the flight information on the television monitors behind the ticket agents. After observing the defendant behaving in an "unusually nervous" manner, deputy Brennan briefly assumed a position in the ticket line about five feet behind defendant. Brennan and Carl observed defendant talking with his companion, who was next to him in line, but did not overhear any of the conversation.

When defendant reached the ticket agent, Brennan overheard defendant give the name "Regan" and request a one-way ticket to Boston. As defendant purchased his ticket, his luggage, consisting of two suitcases, was on the floor next to him. Defendant wrote out baggage identification stickers, which were affixed to the suitcases, and the suitcases were placed on the conveyor belt parallel to the ticket counter and behind the ticket

agents. Both Brennan and Carl testified that while in line defendant "seemed to pay particular attention" to his suitcases.

Once he had obtained his ticket and his suitcases were on the conveyor, defendant and his companion proceeded parallel to the ticket counter and conveyor toward the escalator that leads to the boarding area. As he walked (on crutches), defendant looked several times at his suitcases on the conveyor, appearing to pay "particular attention" to the larger bag, and according to Carl looked backward a couple of times. Before reaching the escalator, defendant and his companion parted, the latter apparently leaving the terminal, and defendant continued up the escalator toward the security gate. At that point, the agents remained downstairs for a short time and lost sight of defendant for two to three minutes. Brennan and Carl estimated that they had observed defendant for five to seven minutes when defendant left their sight.

Deputy Brennan then took a close look at defendant's suitcases, still in view on the conveyor, and made note of the numbers on the baggage claim tickets and the fact that the identification stickers were illegibly written. Both Brennan and Carl then took the escalator upstairs and observed defendant boarding Delta Flight 1002, which left at about 1:00 p.m. The deputies did not observe defendant talk to any other persons or make any detours or telephone calls between the escalator and the time he boarded the flight. Both estimated they observed defendant for four to five minutes in the upstairs concourse area.

After defendant's departure, the deputies went back downstairs to the Delta ticket area. Brennan spoke with the ticket agent who had sold defendant his ticket. Brennan learned that defendant, travelling under (his actual) name "Jack Regan," had paid for his ticket with cash, and that defendant's flight had been scheduled to depart for Boston at about 12:45 p.m., but had been delayed. Also, defendant had given the airline no local telephone number at which he could be reached.

Shortly after defendant's departure, at approximately 1:15 p.m., deputy sheriff Brennan telephoned Drug Enforcement Administration ("DEA") special agent Robert M. Sampson in Boston, and conveyed in substance the above information concerning defendant,[1] and suggested that Sampson conduct further investigation upon defendant's arrival in Boston. Brennan later, "in the next day or so," wrote a report of his observations.

Following the receipt of the information from Ft. Lauderdale Agent Sampson and Special Agent Herbert J. Lemon went to Gate 28 in the Delta Airlines terminal at Boston's Logan Airport. There, at about 3:40 p.m., they observed defendant disembark from Delta Flight 1002. Massachusetts State Police Officer Andrew Palombo was also present. All three were dressed in business suits. Defendant was on crutches, and though not the last was one of the last of the passengers to deplane.

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[1]The testimony of DEA agents Sampson and Lemon conflicted on when the agents learned from Brennan of defendant's last-minute arrival. I credit Sampson and find that this information was not conveyed until shortly before the hearing, and was not known to the agents on March 18, 1981.

Defendant was met by a woman later identified as Celinda Kaye, who greeted defendant with a kiss.

Upon identifying defendant, Agent Sampson left the other two officers and went to the Delta baggage area. There, after checking with the person in charge of the delta baggage department, Sampson identified and verifed by claim check number the two bags described by Deputy Sheriff Brennan. Sampson noted that the red, white and blue identification stickers were written semi-illegibly. Based on his prior knowledge of defendant's name, Sampson was able to make out the name "Regan."

Defendant and Kaye walked down the concourse leading from the boarding gates to the baggage claim area—a distance of approximately 200 feet. Agent Lemon and trooper Palombo followed them. On three occasions, defendant looked backward over his shoulder. Just prior to their arrival at the Delta baggage area, Kaye departed and defendant halted near one end of the baggage conveyor and remained there, somewhat apart from the other passengers. Agent Sampson emerged from the Delta baggage handling area and rejoined agent Lemon in the baggage claim area. The two observed defendant waiting for his luggage for about ten minutes. During this period, defendant periodically scanned the baggage area, looking from side to side. Defendant removed his two bags from the conveyor, put both crutches under one arm, and proceeded to leave the baggage claim area after presenting two claim checks to the security guard.

As defendant approached the glass doors leading out of the terminal to the street, agent Sampson

approached defendant from the right, presented his DEA "credentials," identified himself as a DEA agent, and asked if defendant would mind speaking with Sampson and agent Lemon for a few minutes. Defendant responded, "sure," apparently turning around so that his back was facing the glass doors. At this point agent Sampson was two to three feet to the right of defendant and Lemon was a similar distance to the left. Trooper Palombo was in the vicinity, but at least ten feet away, and did not join the group.

In response to questions from agent Sampson, defendant stated that he had come from Ft. Lauderdale, that he had been there four days, and that he had been there on a pleasure trip. When Sampson asked if he could see defendant's airplane ticket, defendant reached into his pants pocket, pulled out a number of $10 and $20 bills, and said he must have left his ticket on the plane. Sampson asked defendant for some identification, and defendant produced a Massachusetts driver's license in the name of John H. Regan. Sampson examined the license, handed it to Lemon, and one agent or the other promptly returned the license to defendant. I do not credit defendant's assertion that the agents retained his driver's license continuously until defendant had accompanied them to the DEA office. Nor, however, do I credit the agents' testimony that defendant showed no evidence of sunburn or suntan as a result of his trip to Florida. I credit the testimony of Celinda Kaye, John Ebert, and defendant that defendant's face was suntanned or sunburned.

Defendant then asked what the problem was. Sampson responded that the agents were conducting a

narcotics investigation and asked if defendant had any drugs in his bags. Defendant stated that he had some prescription drugs, unzipped the smaller bag, and produced three prescription bottles. Lemon stated that they were not interested in prescription drugs, but were looking for drugs like cocaine and marijuana. Lemon asked whether there were any drugs in the larger bag. At that point, defendant "became visibly upset" and paled noticeably, and said he had only clothes in the large suitcase. Lemon asked whether the agents could take a look inside the larger bag, and advised defendant that he had the right to refuse. Defendant said he did not want to open the larger bag, and asked what would happen if he refused. Agent Lemon stated that defendant was free to go, but that the agents intended to have the bag examined by a narcotics detector dog. Lemon explained that if the dog "alerted" to the bag, the agents would attempt to secure a warrant to search the bag. Defendant asked if he had to wait while this procedure was performed. The agents advised defendant that he could go, offered to give him a receipt for the bag, which they would detain until the detector dog was available. Defendant said he would leave the bag and take a receipt, and agreed to accompany the agents to the DEA office to obtain a receipt.

At this point, Celinda Kaye arrived in the area, saw defendant with the agents, and attemted to avoid being seen by walking behind two malboxes and a glass display case, away from defendant and the agents. Agent Lemon, joined by trooper Palombo, walked over to Kaye, while Sampson remained with defendant. Lemon and Palombo identified themselves, and asked Kaye if she knew defendant. Kaye answered that she had never seen him before in her life. Agent Lemon informed

Kaye he had seen her greet defendant on his arrival at the airport. She then admitted knowing defendant and that she worked with him. Lemon asked to check Kaye's pocketbook for weapons; Kaye initially refused, but after Lemon insisted, Kaye permitted him to search the purse. The search revealed no weapons. I do not credit Kaye's assertion that Lemon forcibly took the bag from her. However, I do credit Kaye's version (corroborated by an airlines employee) and discredit Lemon's to the extent that she testified this event occurred inside the terminal's glass doors rather than outside at her car. Lemon and Palombo then accompanied Kaye outside to her car, where she produced her license and registration. Palombo at some point radioed in to his office for a check on the license and registration, which disclosed no problems. Kaye was then advised she was free to go, and re-entered the terminal to wait for defendant.

Meanwhile, defendant had accompanied agent Sampson to the DEA office on the third floor of the terminal building. Sampson carried both bags, with defendant's assent. At the DEA office, Sampson learned that the U.S. Customs Service narcotics detector dog was not available until the next day. Sampson again requested defendant's driver's license and wrote down the identifying information appearing thereon, and in response to questions learned that the license no longer bore defendant's current address. Sampson also asked to see the prescription vials again and recorded information appearing on the labels. Sampson gave defendant a handwritten receipt for defendant's large suitcase, and a telephone number to contact regarding the suitcase. Defendant then departed the DEA office,

rejoined Kaye in the baggage area, and left the airport. At some later time that afternoon, a computer "missing and wanted check" was done on defendant, which disclosed nothing of note. The total time that elapsed from the time Lemon and Sampson first approached defendant until he left the DEA office was about 20 minutes.

Later that afternoon, Lemon and Sampson took defendant's suitcase to the Boston DEA office, where it was placed in an evidence vault. The next day, March 19, 1981, Lemon and Sampson removed the suitcase from the vault and took it to the DEA office at Logan Airport, where they met with U.S. Customs Inspector Rick Lefebvre. Customs Service detector dog "Harvey," who had been trained to "alert" to the smell of marijuana, hashish, heroin, and cocaine, was brought to the door of the DEA office. Harvey went directly to defendant's suitcase and "alerted"—*i.e.*, scratched and bit or barked at the bag. On the basis of a four-page affidavit of agent Sampson reciting substantially the above facts, a U.S. Magistrate issued a search warrant. Agent Sampson searched the suitcase and found approximately four and one-half ounces of cocaine.

II.

Defendant's motion to suppress presents several interrelated issues: (1) was the DEA's agents' initial encounter with defendant a "seizure" of defendant's person within the meaning of the Fourth Amendment; (2) if the initial encounter constituted a "seizure," did the agents have a reasonable suspicion that defendant was carrying illegal drugs; (3) was the detention of

defendant's suitcase reasonable under the applicable Fourth Amendment standard?

A.

Was the Initial Encounter a "Seizure"?

Defendant argues that his initial encounter with DEA agents Lemon and Sampson was a "seizure" of his person within the meaning of the Fourth Amendment, that could be justified only by "reasonable suspicion" of criminal activity. The leading case of *Terry v. Ohio*, 392 U.S. 1 (1968), makes clear that not all contacts between police officers and citizens rise to the level of "seizures," implicating Fourth Amendment protections. "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Id.* at 19 n. 16. The standard for determining whether a seizure of the person has occurred is whether, "in view of all the circumstances, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion); *id.* at 560 n. 1 (Powell, J., concurring); *quoted in United States v. West*, No. 80-1727, slip op. at 3 (1st Cir., June 16, 1981). Thus, the test is an objective one. *See United States v. Viegas*, 639 F.2d 42, 44 (1st Cir.), *cert. denied*, 101 S.Ct. 2046 (1981). In applying the "not free to leave" standard, the First Circuit in *West* cited the examples given by Justice Stewart in *Mendenhall* of a "show of authority" sufficient to constitute a seizure:

> the threatening presence of several officers, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

West, slip op. at 4, *quoting* 446 U.S. at 554.

In *Mendenhall*, an airport "stop" case, two Justices (Stewart and Rehnquist) concluded that the DEA agents' contact with the defendant for questioning was not a "seizure," where the encounter took place in a public concourse, the two agents wore no uniforms and displayed no weapons, the agents approached rather than summoning the defendant, and requested to see her ticket and identification rather than demanding it. 446 U.S. at 555. Three Justices (Burger, C.J., Powell, and Blackmun) did not reach the seizure issue, assumed a seizure had occurred, and concluded that the agents had reasonable grounds for suspicion, sufficient to justify a seizure of the person. 446 U.S. at 565. These three Justices noted that "the question whether the respondent in this case reasonably could have thought she was free to 'walk away' when asked by two Government agents for her driver's license and ticket is extremely close." 446 U.S. at 560 n. 1. The four dissenting Justices agreed that the Court should not have reached the seizure issue not decided below but, assuming a seizure, concluded that the agents lacked sufficient grounds for suspicion. 446 U.S. at 571.

United States v. West involved an airport stop by two officers who approached the defendant in the concourse just after he had passed through the metal

detector. The defendant "responded to [the officers'] questions in a cooperative manner, showing them identification and permitting a search of his boots, but refusing a search of his suitcase," after which defendant "terminated the conversation himself" and left to board his flight. Slip op. at 2. The Court of Appeals, after quoting the "not free to leave" test, stated that "the cases have found a seizure only where the police have engaged in a *'show of authority'* which could be expected to command compliance, beyond simply identifying themselves as police." Slip op. at 3 (emphasis added). The court noted the absence of circumstances such as those quoted from *Mendenhall* above or "any other display of authority by the officers which would indicate a seizure," and that the defendant "in fact, eventually did leave, on his own initiative." On this basis the court affirmed the district court's conclusion that no seizure had occurred.

Another recent First Circuit airport "stop" case with factual parallels to both the present case and *West* did not decide the "seizure" issue because the court held that the agents had sufficient grounds to "seize" the defendant.

United States v. Viegas, 639 F.2d 42, 44 (1st Cir. 1981).

A number of other recent airport drug "stop" cases have assumed, without explicitly deciding, that a seizure of the person had occurred. *See, e.g., Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam); *United States v. Buenaventura-Ariza*, 615 F.2d 29, 31 (2d Cir. 1980). *See also United States v. Wylie*, 569 F.2d 62, 68 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 944 (1978) (holding

initial police contact not a seizure where tone of policeman's inquiry outside bank suggested suspect was free to leave).

The question whether defendant in this case was "seized" upon his initial encounter with agents Lemon and Sampson is a close one. However, taking guidance from *West*, I conclude that defendant's person was not seized; *i.e.*, that a reasonable person under the circumstances would not have "believed that he was not free to leave." Beyond the fact that Lemon and Sampson initially identified themselves as DEA agents, there was no "show of authority" of a type similar to the kinds of intimidating circumstances cited in *Mendenhall* and *West*, *supra*. Here, the two agents, dressed in business suits, approached defendant inside the terminal area as defendant was walking toward the exit doors to the street. No weapons were displayed—just the agents' "credentials" portfolio containing a "pocket commission" and photo-identification. Defendant was not told to stop or the like. When asked if he would speak with the agents he replied, "Sure." Although one agent assumed a position close to defendant on either side, there is no evidence that the agents blocked defendant's path or in any way physically restrained his freedom of movement. There was no touching of defendant's person, or of his luggage at this point.

After a few preliminary questions about the origin, duration, and purpose of defendant's trip, the agents asked to see defendant's airplane ticket (which he did not have) and some identification. The agents examined defendant's driver's license in a cursory manner and promptly returned it. In the course of their questions

concerning illegal drugs, the agents never stated that they suspected defendant was carrying such drugs, nor demanded to examine defendant's luggage. Defendant voluntarily opened his smaller bag and produced prescription vials, which were promptly handed back to him. The agents' request to look inside the larger suitcase was accompanied by the advice that defendant had the right to refuse, which he did. When defendant inquired about the consequences of this refusal, he was explicitly informed that he was free to leave, but the bag was not. Although the latter fact may indicate that defendant was no longer unconditionally free to leave, this circumstance arose only *after*, as discussed *infra*, defendant's behavior during the conversation had given the agents additional grounds for suspicion that defendant possessed illegal drugs.

Nor did the encounter become a "seizure" by virtue of defendant's trip with agent Sampson to the DEA office. As noted *supra*, I discredit defendant's claim that Sampson had retained defendant's driver's license, compelling him to come to the office to reclaim it. I find that, as was held in *Mendenhall*, defendant consented to go to the DEA office. Defendant accompanied Sampson "voluntarily in a spirit of apparent cooperation," *Mendenhall*, 446 U.S. at 557 (opinion of the Court) (joined by five justices), after informing Sampson that he chose to leave the suitcase and to obtain a receipt if the detector dog was not immediately available. There was no coercion. Finally, the facts that Sampson asked defendant a few more "personal history" type questions once in the DEA office, requested again to see defendant's license and prescription bottles, and wrote down certain information do not affect this conclusion. There is no

evidence that this routine and unobtrusive procedure was part of any insidious preconceived plan of Sampson's to detain defendant further. In short, there is no evidence that defendant's cooperation was not freely and voluntarily given.

I find the encounter between defendant and the two DEA agents here to be sufficiently similar to the initial encounter described in *West*—where two officers approached the defendant "after he had passed through the metal detector and started walking down the concourse" and "[h]e responded to their questions in a cooperative manner, showing them identification and permitting a search of his boots, but refusing to permit a search of his suitcase"—to compel the conclusion that no seizure of defendant's person occurred here. Although the defendant in *West* "terminated the conversation himself" and walked away, the fact that defendant did not do the same here does not materially distinguish this case. The test is an objective one—whether a reasonable person would have believed that he was *not* free to leave—not whether a particular defendant in fact exercised that prerogative. The intrusion of the initial encounter was, like that in *Mendenhall*, "quite modest." 446 U.S. at 562-63 (Powell, J., concurring in part). In sum, the evidence here fails to disclose any " 'show of authority' which could be expected to command compliance" or other coercive or intimidating circumstances sufficient to make a reasonable person feel that his liberty was restrained. For these reasons I conclude defendant was not "seized" within the meaning of the Fourth Amendment.

B.

Were There Reasonable Grounds for Suspicion?

Although my conclusion that the encounter between defendant and the DEA agents was not a "seizure" makes decision of the "reasonable suspicion" issue unnecessary, in light of the closeness of the seizure issue it is appropriate to consider whether the agents possessed sufficient information at the time of the initial contact to justify a seizure of defendant.

The Supreme Court in *Reid v. Georgia*, 448 U.S. 438, 440 (1980) (per curiam) stated the prerequisites to a lawful seizure thus: "[A]ny curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity." *See also State of Michigan v. Summers*, ___ U.S. ___, 49 U.S.L.W. 4776, 4778 (June 22, 1981) ("articulable basis for suspecting criminal activity" required). As recently summarized by the First Circuit in *United States v. Viegas*, 639 F.2d 42, 44-45 (1st Cir. 1981), the "reasonableness" of police action " 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests,' " which "in turn, depends upon the officer's ability 'to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion' " (citations omitted). The court stated that "[i]n determining which inferences are rational, due credit must be given to the experience and expertise of the officers," and all of the facts before the agents must be "viewed in their entirety" rather than in isolation. *Id.* at 45.

Defendant relies heavily on *Reid* in support of his argument that agents Lemon and Sampson lacked reasonable suspicion that defendant was engaged in criminal activity. In *Reid*, an airport drug stop case, the DEA agent based his suspicion of the defendant on certain characteristics that fit the "so-called 'drug courier profile' "; specifically:

> that (1) the petitioner had arrived from Fort Lauderdale, which the agent testified is a principal place of origin of cocaine sold elsewhere in this country, (2) the petitioner arrived early in the morning, when law enforcement activity is diminished, (3) he and his companion appeared to the agent to be trying to conceal the fact that they were travelling together, and (4) they apparently had no luggage other than their shoulder bags.

448 U.S. at 441. The Court held

> that the agent could not, as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances. Of the evidence relied on, only the fact that the petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct. The other circumstances described a very large category of presumably innocent travellers, who would be subject to virtually random searches were the Court to conclude that as little foundation as there was in this case could justify a seizure.

Id.

In *United States v. Mendenhall*, 446 U.S. 544 (1980), decided shortly before *Reid*, two of the five Justices who concluded the stop and ensuing search were lawful (Justices Stewart and Rehnquist) did not reach the "reasonable suspicion" question because of their conclusion that no seizure occurred. The three concurring Justices (Chief Justice Burger and Justices Powell and Blackmun) assumed a seizure had occurred and, weighing the "modest" intrusion of the stop against the factors observed by the agents that prompted the stop and the "compelling" public interest in halting drug traffic, concluded that "the agents possessed reasonable and articulate suspicion of criminal activity when they stopped the respondent in a public place and asked her for identification." 446 U.S. at 560-65. This conclusion was based on several factors: the experience and expertise of the DEA agents in detecting probable drug couriers, the agents' observations that the defendant deplaned last, "scanned the entire gate area and walked 'very, very slowly' toward the baggage area," claimed no baggage, changed flights en route, "appeared very nervous," and generally "engaged in behavior that the agents believed was designed to evade detection," typical, of drug couriers. *Id.* at 563-64. The four dissenting Justices also assumed a "seizure," but concluded that "[n]one of the aspects of Ms. Mendenhall's conduct, either alone or in combination, were sufficient to provide reasonable suspicion that she was engaged in criminal activity." 446 U.S. at 572. The dissent stressed the absence of any prior information concerning defendant, the lack of any observed "unusual conduct," and the likelihood of innocent explanations for each factor relied upon by the DEA agents.

The most recent guidance from the First Circuit on what constitutes "reasonable, articulable grounds for suspicion" is the opinion in *United States* v. *Viegas, supra.* In that case the Court, in a two-to-one decision written by Judge Aldrich and joined by Judge Campbell, affirmed the district court's holding that the DEA agents' stop of defendant was based on reasonable suspicion. The observations upon which the DEA agents relied concerning the defendant's arrival at Boston's Logan airport were the following: a man's inquiry into where the bags from a post-midnight flight from Miami, "a recognized cocaine source," would appear; his return to the gate area and entry into a phone booth, where while making an apparent call he kept the booth door open and "was looking up and down the concourse"; his meeting with defendant, without shaking hands, when defendant deplaned from his Miami flight; the two men's entry into adjoining phone booths, with the doors left open, and "peering out of the phone booths, looking up and down the corridor in each direction" in a manner consistent with a drug courier's attempts to identify surveillance; defendant and companion's turning and looking behind them "five or six times" while walking to the baggage area; and their "constantly looking around" while waiting for defendant's luggage. 639 F. 2d at 43. The majority of the panel concluded that "the facts before the agents, viewed in their entirety, adequately justified the initial inquiry," in that "[t]he slight intrusion of the encounter was supported by the pair's evasive actions in the airport, viewed in light of defendant's arrival from a known distribution center." *Id.* at 45. The majority rejected the argument that defendant's actions could be viewed as "consistent with innocent behavior," and stated that "there was considerably greater cause for suspicion here than in *Reid* v. *Georgia*";

in particular defendant's and companion's "frequent glances over their shoulders at no one in particular" (as opposed to Reid's glances at a fellow traveller on the same plane whom he later joined) and their telephone booth actions, both of which "would reasonably suggest attempted detection, and evasion, of surveillance." *Id.* at 45 & n. 5. Judge Bownes, in dissent, concluded that *Reid* controlled because of the "remarkably similar" factors that triggered the stop there, and that "consider[ing] each factor in turn" he found each element of the conduct relied upon "equally consistent with innocent behavior." 639 F.2d at 46-49.

Although the issue is a close one, and the distinctions among *Reid*, *Mendenhall*, and *Viegas* could be considered minimal, I conclude that the instant case is controlled by *Viegas* and that the factors relied upon by agents Lemon and Sampson in stopping defendant were sufficient to constitute "reasonable, articulable grounds for suspicion." Here, the agents relied both upon the information received by telephone from Fort Lauderdale (similarly to the situation in *West*, *supra*) and their own observations of defendant upon his arrival in Boston. The factors articulated by agents Lemon and Sampson at the hearing as being significant in content were the following:

(a) **From Fort Lauderdale.** Agent Sampson had been informed by deputy sheriff Brennan that defendant (1) appeared "unusually" or "extremely" nervous, (2) repeatedly looked backward toward the officers while waiting in the ticket line; (3) paid in cash for a one-way ticket to Boston, and (4) kept looking at the larger suitcase as it moved on the baggage conveyor.

(b) **In Boston.** Agents Sampson and Lemon observed and took into account in addition to the above that defendant: (1) arrived from Fort Lauderdale, a major "source city" for drugs such as cocaine and marijuana, (2) was among the last passengers off the plane, (3) looked backward over his shoulder three times "in a manner consistent with looking for surveillance," as he walked with Kaye down the concourse, despite the fact that he had already met his friend, (4) had written his luggage identification tags illegibly, and (5) "continually" scanned the baggage area while waiting for his luggage. It was only after making these observations that Lemon and Sampson approached and contacted defendant. The agents testified that, although any one of these factors taken in isolation may be insignificant, the totality of these circumstances, viewed in light of their experience in drug courier surveillance,[2] made them sufficiently suspicious to approach defendant to ask questions.

I conclude that, when viewed together through the eyes of an experienced narcotics agent, *see Mendenhall, supra*, 446 U.S. at 563-64 (Powell, J., concurring in part), the above observations constitute "specific and articulable facts which, taken together with rational inferences from those facts," *Terry, supra*, 392 U.S. at 21, are sufficient to surmount the "reasonable suspicion" threshold. In particular, I find significant defendant's repeated looks over his shoulder and scanning behavior, behavior distinctively different from that

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[2]Special Agent Sampson had been a DEA agent for 15 years, and had been assigned to Logan Airport for one year and nine months. Special Agent Lemon had been a DEA agent for 10½ years, and assigned to Logan Airport for one year and six months.

exhibited by a "typical" nervous, "innocent" air traveller going to and from his or her flight. Like analogous actions in *Viegas*, this behavior by defendant, together with the larger number of factors relied upon here consistent with the so-called "drug courier profile," distinguished this case from *Reid*. As in *Viegas*, defendant's actions here "would reasonably suggest attempted detection, and evasion, of surveillance." *Viegas, supra*, 639 F.2d at 45 n. 5.

Drawing the line between "reasonable and articulable suspicion" and an "inchoate and unparticularized suspicion or 'hunch,'" *Reid, supra*, 448 U.S. at 440-41, in cases such as this, is a difficult task. To be sure, a plausible "innocent" explanation could be offered for each of the above-enumerated factors, and other possible "drug courier profile" characteristics cited in other cases were absent (*e.g.*, one-day "turnaround" trips, checking no luggage, placing phone calls or entering rest rooms, or walking unusually slowly or rapidly through the airport). However, it must be recognized that drug couriers are likely to be sufficiently sophisticated to avoid flagrantly "unusual" or "suspicious" behavior. Subtle and potentially ambiguous cues must necessarily be relied on to a large extent by drug enforcement agents. I conclude that this case is closer to *Viegas* and *Mendenhall* than to *Reid*, and that even if defendant was "seized," on these facts a seizure was justified and did not violate defendant's Fourth Amendment rights.

C.

Finally, defendant contends that the agents lacked sufficient grounds to seize defendant's suitcase, and

that probable cause was required to detain it overnight. Both contentions lack merit.

Terry and its progeny make clear that the "reasonableness" of a particular police action in the Fourth Amendment context is to be determined by weighing the competing individual and governmental interests under the circumstances. The greater the intrusion on an individual's liberty, the greater the quantum of "specific and articulable facts" necessary to justify the intrusion. *See Terry, supra*, 392 U.S. at 21; *Michigan v. Summers, supra*, ___ U.S. ___, 49 U.S.L.W. at 4778 & n. 12; *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *Mendenhall, supra*, 446 U.S. at 561 (Powell, J., concurring in part); *Viegas, supra*, 639 F.2d at 44.

Temporary detention of luggage for a reasonable period "is governed by the same standard as a temporary detention of the person; *i.e.*, reasonable suspicion." *Viegas, supra*, 639 F.2d at 45; *West, supra*, slip op. at 5-6 ("by the time they detained the suitcase the agents in Boston reasonably suspected West of criminal activity"). Probable cause is not required. *Id.*

Even if a greater degree of "reasonable suspicion" were required to detain defendant's suitcase overnight than was required to detain defendant for questioning (or even assuming the agents did not have "reasonable suspicion" at the initial contact), I conclude that the agents gathered sufficient additional information and observations during their conversation with defendant to justify the detention. *See United States v. Klein*, 626 F.2d 22, 25 (7th Cir. 1980) (additional information gained after initial *Terry* non-seizure "stop," coupled with agents'

previous observations and information telephoned from Florida, sufficient to create reasonable suspicion). Specifically, (1) the DEA agents learned that defendant had left his ticket on the plane (despite the fact that he had retained the baggage claim checks that are routinely stapled thereto); (2) when asked about "drugs," defendant voluntarily opened his small suitcase and produced prescription vials, but refused to open the large suitcase (*cf. U.S. v. West*, 495 F. Supp. 871, 875 (D. Mass. 1980), *aff'd*, slip op., *supra* (significance of consent to search of boots, but not bag, even despite right to refuse search of both)); (3) defendant paled and became "visibly upset" when the agents' attention focused on the large suitcase; and (4) the agents observed Celinda Kaye's evasive behavior upon spotting defendant talking with them.

These additional factors, taken cumulatively with the agents' previous information and observations, provided ample "reasonable suspicion" to detain defendant's suitcase pending a "sniff check" by the narcotics detector dog. Although detention of one's suitcase overnight at the local airport is doubtless an inconvenience and more intrusive than being stopped in a public corridor for brief questioning, the intrusiveness of the procedure in this case was not so great as to require probable cause. The suitcase was held at most 22 hours between the time it was taken from defendant until the time the dog's sniff and "alerting" furnished probable cause for the search that produced the cocaine here at issue. The delay was occasioned by the temporary unavailability of the U.S. Customs Service detector dog and handler. Defendant's home is in the greater Boston area, and he had just returned home, making the degree of incovenience similar to that permitted in *Viegas, supra*, 639 F.2d at 45 (suitcase detained to await

availability of detector dog, defendant departed; inconvenience "less . . . than if he were going away rather than returning home"); and less than that permitted in *West, supra* (suitcase detained in Boston to await dog; defendant flew home to Vermont). The intrusiveness of such a luggage detention upon defendant's "reasonable expectation of privacy . . . in no way compares with an actual search of the contents of the suitcase." *Viegas, supra*, 639 F.2d at 45 (citations omitted). As the court observed in *West*,

> [g]iven the information the agents had at the time they detained the suitcases, . . . and given the lack of effective alternatives available to the agents under the circumstances, and the strong likelihood that [defendant] now fully alerted, would take immediate steps to dispose of any contraband located in the suitcase, the agents' action in detaining the suitcase for investigation was reasonable.

The DEA agents were thus in lawful possession of defendant's suitcase pending further investigation. It is clear that having a suspect's luggage sniffed by a detector dog—now an accepted drug investigation technique—is not a "search" and therefore requires less than probable cause, *e.g., United States v. Sullivan*, 625 F.2d 9, 12-13 (5th Cir. 1980), *cert. denied*, 101 S.Ct. 1374 (1981). The fact that detector dog "Harvey" here "alerted" to defendant's suitcase, together with all of the agents' prior observations, all of which were set forth in agent Sampson's affidavit, provided the necessary probable cause to support the issuance of the warrant and ensuing search of the suitcase.

Defendant's claim that the search warrant was overbroad is without merit. The item to be searched and the things to be seized upon were described with sufficient particularity to satisfy the Fourth Amendment. The inclusion of the phrase "quaaludes, cutting material, and other drug-related paraphernalia," together with "controlled substances, marijuana, cocaine [and] hashish" does not, in this context, make the warrant "fatally general." *Cf. Andresen v. Maryland*, 427 U.S. 463,479 (1976).

/s/ Robert E. Keiton
United States District Judge

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

Indictment No. A-51531

STATE OF GEORGIA

-vs-

DON M. BRANT

ORDER

This court must balance the compelling public interest in law enforcement detecting drug trafficking with the abuse of overzealous agents unreasonably making random "seizures" upon innocent travelers who happen to fall into a necessarily undefined "drug courier profile." While the police, as any other citizen, enjoy the right to ask questions of strangers, to characterize every encounter as a "seizure" would not further any Fourth Amendment constitutionally protected interest. This court has had an opportunity to judge the credibility of both Agent Markonni and the Defendant at the hearing on the Motion to Suppress. The court concludes that there was no "seizure" within the meaning of the Fourth and Fourteenth Amendments when Agent Markonni merely requested permission to speak to the Defendant.

However, there is a close question as to whether or not there was a seizure upon the taking of the Defendant's airline ticket. See, n. 1 (Stewart, J., concurring) and n. 2 (White, J., dissenting) in United States v.

Mendenhall, ____ U.S. ____, 64 L.Ed 2 497 (1980). The facts in the instant case are strikingly similar to the recent Court of Appeals decision in McShan v. State, ____ Ga. App. ____ (1980), wherein that court addresses the *Mendenhall* decision, and concludes, based upon the factors considered in *Mendenhall* that there was no illegal seizure. Here, as in *Mendenhall*, the events took place in the public concourse of a busy international airport. The agent wore no uniform and displayed no weapons. The agent did not summon the Defendant to his presence, but instead approached him and identified himself as a federal agent. The agent requested but did not demand to see Defendant's identification. Although the testimony is somewhat conflicting, the Defendant at the suppression hearing stated that he did not see the agent's gun; that the agent was "polite, but firm" in talking to him, and that the agent was wearing casual clothes. in *Mendenhall*, the Defendant was a young black female who had not yet graduated high school, who was confronted by two white male officers. Here we have a 28 year old white male who is confronted by only one white male officer.

In *Mendenhall* the agents returned the boarding pass to the Defendant and there seems to be a dispute about the majority opinion in *Mendenhall* as to whether or not the Court should have even reached the seizure issue, for apparently it may not have been properly raised. This court finds, however, that Agent Markonni possessed specific and articulable standards to justify such an intrusion on the Defendant's Fourt Amendment rights. Here it is quite significant, as the agent testified, that besides the general characteristics of the drug carrier, such as little baggage, coming from a distribution

center of narcotics such as Miami, the agent also discovered that the Defendant was on a one-way ticket, that the Defendant paid cash and that the name on the ticket was "B. Donald." It is also undisputed that the agent saw and heard the Defendant place a telephone call immediately upon deplaning. The agent unequivocably testified that he heard the name "Bruce Powell" used by the Defendant on making a collect phone call. The Defendant left the telephone booth, whereupon the agent secured the call-back number from Delta requesting a Mr. Donald or Bruce Powell. The person answering denied knowing either person. These factors, coupled with the fact that the agent in this case not only initiated the Atlanta program in terms of trying to deter drug trafficking at airports, but also started the same drug enforcement procedures in the Detroit airport, which conicidentlly is where the *Mendenhall* case derived from. These factors, particularly the agent discovering that the Defendant used a fictitious name, distinguishes this case from Reid vs. Georgia, __ U.S. __ (1980), and gives rise to the agent having a reasonable and articulable suspicion of the Defendant. Accordingly, although this court has previously found that a seizure did not take place under the *McShan* and *Mendenhall* majority opinions, even were it assumed a seizure did occur when the agent obtained possession of the Defendant's ticket, there being reasonable suspicion of the Defendant's wrongdoing, the court concludes that there was no Fourth Amendment violation under either analysis. What makes this case even stronger for the state is the fact that upon considering the testimony of the agent and the Defendant, it seems clear that the Defendant willingly gave the airline ticket to the agent. Thus this court holds that Defendant consented to the giving of his airline ticket, which would negate the requirement

for reasonable suspicion. It was only after the agent requested the Defendant's airline ticket that he asked the Defendant what his name was, to which the Defendant replied, "Bruce Donald." The Defendant initially denied possessing any identification; however, upon a subsequent request for identification, the Defendant gave the agent his license and an explanation for using a different name. At that point, the agent arrested the Defendant for violating the Georgia false name statute.

The authority cited by the Defendant's counsel for the agent improperly arresting the Defendant for violation of the Georgia false name statute does not dispute the thrust of Ga. Code Ann. §24-2811, wherein the sheriff of a local county has it within his discretion to appoint a deputy. Nor does Defendant's authority show any improper purpose by such an appointment so as to infringe upon the Tenth Amendment. See United States v. Polvano, CR. NO. 79-11-7 A (Magistrate's report and recommendation) Defendant also argues that statements made by him to the agent should be suppressed due to the failure of the agent to provide the Fifth Amendment warnings. The U.S. Supreme Court decision in *Mendenhall* specifically addressed this issue that Miranda warnings were not required for general on-the-scene questioning. Accordingly, it would not be a violation of the Fifth

Amendment. See United States v. Mendenhall, *supra* at 510.

Accordingly, the Motion to Suppress is denied.

AND IT IS SO ORDERED.

This 4th day of December, 1980.

/s/ Luther Alverson
Luther Alverson
Judge, Superior Court
Atlanta Judicial Circuit

Supreme Court, U.S.
FILED
MAR 24 1982
ALEXANDER L. STEVAS
CLERK

NO. 80-2146

in the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF FLORIDA,

Petitioner,

vs.

MARK ROYER,

Respondent.

On Writ of Certiorari to the
District Court of Appeal of Florida,
Third District

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

The Respondent believes that the phraseology of the question presented by the Petitioner inaccurately depicts the holding of the unanimous en banc Florida District Court of Appeal decision. Based upon the decision appealed from, Respondent submits that the following question is the proper one presented to this Court by the decision the Petitioner seeks to have reviewed:

I.

WHETHER THE DECISION OF A UNANIMOUS EN BANC FLORIDA APPELLATE COURT BASED ON THE FLORIDA CONSTITUTION AND THE FOURTH AMENDMENT PROPERLY SUPPRESSED CONTRABAND SEIZED BY NARCOTICS OFFICERS BASED ON THE FOLLOWING FINDINGS:

A) RESPONDENT WAS INVOLUNTARILY CONFINED ("IN CUSTODY") WITHOUT PROBABLE CAUSE WHERE HE 1) WAS INFORMED HE WAS SUSPECTED OF TRANSPORTING NARCOTICS, 2) HIS AIRLINE TICKET AND LUGGAGE WERE TAKEN FROM HIM BY THE OFFICERS AND NEVER OFFERED OR RETURNED TO HIM, AND 3) WAS ASKED TO ACCOMPANY TWO AIRPORT NARCOTICS OFFICERS TO A SMALL OFFICE WHERE THE SEARCH WAS CONDUCTED.

B) THE "DRUG COURIER PROFILE" USED BY NARCOTICS OFFICERS IN THE INSTANT CASE DOES NOT CONSTITUTE PROBABLE CAUSE TO ARREST OR CONFINE RESPONDENT.

C) RESPONDENT'S ALLEGED "CONSENT" GIVEN AFTER UNLAWFUL CONFINEMENT WAS INVOLUNTARY AND INVALID.

D) UNLESS THERE IS PROBABLE CAUSE, EXIGENT CIRCUMSTANCES CANNOT SERVE TO "EXCUSE" A SEARCH WARRANT.

II.

WHETHER THE STATE TIMELY RAISED ITS CLAIM FOR A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE AND WHETHER SUCH AN EXCEPTION IS PERMISSIBLE UNDER THE INSTANT FACTS OR UNDER ANY FACTS.

III.

WHETHER THE FLORIDA APPELLATE COURT PROPERLY SUPPRESSED THE CONTRABAND IN ACCORDANCE WITH FLORIDA'S CONSTITUTIONALLY INCORPORATED EXCLUSIONARY RULE EVEN IF THIS COURT WERE TO DETERMINE THAT THE CONTRABAND WAS NOT SEIZED IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

IV.

WHETHER THE INSTANT APPEAL IS MOOT DUE TO THE STATE'S FAILURE TO SECURE A STAY OF THE FLORIDA APPELLATE COURT'S DECISION AND OF THE ORDER OF DISCHARGE WHICH FREED THE RESPONDENT PURSUANT TO THE MANDATE OF THE FLORIDA APPELLATE COURT'S DECISION.

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PREFACE

The parties will be referred to as follows:

1. Petitioner, The State of Florida, as "Petitioner" or the "State."

2. The Respondent, Mark Royer, as the "Respondent."

3. The United States, Amicus Curiae, as the "United States."

The record is to be referred to as follows:

(A) Joint Appendix

(RA) Respondent's Appendix, incorporated herein.

STATEMENT OF THE CASE

Public Safety Department Officers Johnson and Magdalena were assigned to Miami International Airport on January 3, 1978 and sometime between 12:00 and 12:30 p.m., they encountered the Respondent. (A. 25.) Although neither officer had received any prior information linking the Respondent to criminal activity, their suspicions were aroused by certain observations. (A. 28.) Officer Johnson testified that he and Magdalena were watching Respondent carefully and suspected him of drug trafficking due to his age, nervousness, his two American Tourister suitcases, and the fact that he was looking around continually and watching his bags carefully. (A. 27-35.) Another factor deemed significant by the policemen in regard to Respondent's actions is that he paid for his airline ticket in cash. (A. 35, 36.)

After Respondent bought his ticket, he was given two stick-on adhesive labels for his baggage which had the name "Holt" written on each, the same name in which the ticket reservation was made and in which the ticket was written. (A. 37, 38, 43.) As Respondent left the ticket counter and proceeded to the departure gate for National Airlines, he was stopped by Officers Johnson and Magdalena. (A. 39, 40.) The policemen identified themselves and showed Respondent their badges and identification cards. (A. 40.) Johnson asked Respondent to show him his airline ticket and identification. (A. 41.) After giving the policeman his airline ticket, it was never returned or offered back to Respondent until *after* the subsequent search occurred. (A. 69, 71, 80.) Respondent produced a New Jersey driver's license in the name of Mark Royer and explained

that a friend had made reservations for him in the name of "Holt." (A. 42, 43.)

The officers told Respondent that they were narcotics investigators and that they had reason to suspect that he was transporting narcotics. (A. 44, 70.) The policemen had Respondent accompany them to an interrogation room some forty feet from the point of their encounter. (A. 44, 45.) The room was actually no more than a converted closet fitted with a small desk and two chairs. (A. 45.) Respondent testified that on the way to the room one officer said that the policemen had been waiting for him all morning and wanted to know how much pot was in the bags. Respondent was told that he was crazy to try to do this since there were always guards around. (A. 84.) The officers did not refute Respondent's testimony.

After Respondent reached the police room, Magdalena remained with him as Johnson tore off the baggage stubs from Respondent's ticket and without permission from Respondent, went downstairs to get the bags. (A. 65, 66, 67, 69, 70, 83.) No Miranda warnings had been given nor had the Respondent formally been placed under arrest at this point. (A. 68, 69.) After Johnson returned with the suitcases, of which he took possession without requesting the Respondent's consent, he joined Respondent and Magdalena in the interrogation room. (A. 70.)

Respondent testified that he was asked to empty his pockets and that among the items he took from his pockets was a luggage key. (A. 85, 86.) Officer Johnson stated that upon entering the police room, Respondent was asked if he would give consent to a search of his

suitcases so that the policemen could confirm their suspicions that he was carrying narcotics. (A. 47.) Respondent stated that consent was never specifically asked for and that after he was told to unlock one suitcase and did so, one of the officers opened it. (A. 85, 86.) There is undisputed testimony to the effect that Respondent was never told he had a right to disobey the requests of the policemen or that he had a right to leave or refuse to allow the search. (A. 64, 70, 72, 86, 87.) Respondent testified that he did not believe he was free to leave at any time during this encounter. (A. 80, 81, 82.)

Officer Johnson stated that in response to his request for consent, Respondent did not say anything. (A. 48.) Respondent silently produced the key to the white suitcase which was subsequently opened by officer Johnson. (A. 48.) The second suitcase, the gray one, had a combination lock which Respondent was unable to open. (A. 48.) After Johnson obtained a screwdriver, the gray suitcase was pried open with no apparent objection from Respondent. (A. 48, 49.) After viewing the contents of the suitcases, Respondent was placed under arrrest and read his Miranda rights. (A. 53.)

Respondent filed a Motion to Suppress in the Trial Court which was denied (A. 4-10). Respondent filed a Notice of Appeal to the District Court of Appeals, Third District of Florida. (A. 117). On December 28, 1979, the Appellate Court affirmed the Trial Court in a split decision. 389 So.2d 1007-1015. Respondent's Motion For Rehearing En Banc was granted and on September 9, 1980, the District Court of Appeals for the Third District of Florida rendered a unanimous decision reversing the Trial Court's decision. 389 So.2d 1007

(the two affirming judges on the original panel were not in regular service and did not sit on the en banc court).

The unanimous en banc Florida Appellate Court used a three-step analysis of the facts involved in the case in order to reverse the denial of Respondent's Motion to Suppress and in order to reject the State's primary argument for affirmance, that Respondent effectively and validly consented to the opening of his suitcases. The Appellate Court found that (1) the Respondent was involuntarily confined due to his being informed that he was suspected of transporting narcotics, the taking of his ticket and luggage without returning them to him, and the Respondent's inability to leave the interrogation room. The Court stated that the case presented an "almost classic definition of imprisonment." 389 So.2d at 1018. The Court also found that (2) no probable cause existed since compliance with a drug courier profile does not amount to probable cause. Finally, the Court found (3) the consent was tainted and invalid since any consent given under such circumstances must be deemed involuntary and thus invalid as a matter of law.

The Florida Appellate Court also dealt with the State's contention that exigent circumstances excused the actions of the police officers in the instant case. The Court stated as follows:

> We do not decide whether "exigent circumstances" are involved in departing airline passenger cases like this one because, even if they exist, such circumstances serve only to "excuse" the absence of a warrant. They do

not take the place of probable cause necessary to sustain any search of the kind involved in this case, whether made with a warrant or without one. (citations excluded).

389 So.2d at 1016-1017

After the State's Motion for Stay was denied, the mandate issued. Subsequent to the mandate, and upon motion of the Respondent, the trial court ordered the discharge of the Respondent. (R.A. 1). No appeal was taken from either the denial of the Motion for Stay or the order discharging the Respondent.

SUMMARY OF ARGUMENT

The actions of the narcotics officers in "stopping" the Respondent, at which time identification was requested and investigation commenced, was violative of the Fourth Amendment under *Reid v. Georgia*, 448 U.S. 438, (1980), since there existed no reasonable suspicion that the Respondent was engaging in criminal activity. The Respondent was detained soley upon the observations of the narcotics officers who claimed that the Respondent met certain characteristics set forth in the so-called "drug courier profile." Such compliance describes a large category of presumable innocent travelers and is insufficient to justify the initial seizure of the Respondent under *Reid v. Georgia*.

The drug courier profile has extremely limited usefulness, if any, but in no case should be used to warrant more than a mere contact based upon unfounded suspicion. Mere compliance with a handful of "average" physical characteristics associated with arrested drug

couriers is clearly not sufficient for establishing probable cause to arrest an individual. As this Court ruled in *Reid v. Georgia*, such characteristics completely consistent with innocent behavior are also insufficient for establishing reasonable suspicion. Therefore, if this Court approves the use of the profile in any manner it should be limited to establishing a basis for mere contact only.

The actions of the police officers sufficiently restrained the freedom of the Respondent to amount to an arrest, absent probable cause. The officers told the Respondent he was suspected of transporting narcotics; they took his ticket and baggage stubs and never returned them to him. Additionally, the narcotics officers took the Respondent, who neither had possession of his ticket or bags, for further questioning and a search to a small interrogation room. Upon the occurrence of any one of these circumstances, a reasonable person would objectively conclude that he was not free to leave and, as a result, an arrest occurred. The narcotics officers had no probable cause to arrest the Respondent and one of the officers admitted as such at trial. The Respondent did not give a free, voluntary and unequivocable consent to the search and, any alleged consent is presumed invalid as the product of the illegal arrest.

The State failed to timely preserve its argument regarding a good faith exception to the exclusionary rule, and such an exception should not be applied in this case or any other case. Section 1 of Petitioner's Brief, regarding its attempt to carve out a good faith exception to the exclusionary rule, was never raised below and cannot be validly challenged in this Court. Additionally, the instant case does not involve the

retroactive invalidity of a statute or warrant, nor does it involve a judgmental error where a police officer actually believed he had probable cause to act as he did. The officer involved in the case at bar admitted at the hearing on the Respondent's Motion to Suppress that he had no probable cause prior to the search of the baggage. Finally, a good faith exception to the exclusionary rule is not necessary at this point and should not be promulgated by the Court.

The Florida Constitution includes an express exclusionary rule which affords more protection to the people of the State of Florida than does the Fourth Amendment to the United States Constitution. Therefore, even if this Court were to modify the federal exclusionary rule so as to admit the evidence in question into evidence, the Florida Supreme Court would still be constitutionally obligated under Florida's exclusionary rule to suppress the evidence.

Subsequent to the mandate of the District Court of Appeals of the Third District of Florida, the Respondent was lawfully discharged. (R.A. 1). The State failed to appeal the Order of Discharge and, as a result, the Respondent's freedom has been restored and a second prosecution for the same offense would be barred. Additionally, the failure of the Petitioner to secure a stay of the appellate decision or an appeal of the Order of Discharge renders the instant appeal moot.

ARGUMENT

I.

THE NARCOTICS OFFICERS' INITIAL "STOP" OF RESPONDENT WAS VIOLATIVE OF THE FOURTH AMENDMENT UNDER *REID v. GEORGIA* SINCE THERE EXISTED NO REASONABLE SUSPICION THAT RESPONDENT WAS ENGAGING IN CRIMINAL ACTIVITY.

A. The initial actions of the narcotics officers resulted in at least an illegal investigative detention where the alleged "reasonable suspicion" was no more than partial compliance by the Respondent with a drug courier profile.

The initial "stop" of the Respondent at which time identification was requested and investigation commenced was based entirely upon the narcotics officers' observations that the Respondent met certain characteristics set forth in the so-called "drug courier profile." As this Court ruled in *Reid v. Georgia*, 448 U.S. 438 (1980), compliance with a drug courier profile, describing a large category of presumably innocent travelers, is an insufficient foundation to justify even the initial detention and investigation of the Respondent by the narcotics officers. *Reid* held:

> Although there could, of course, be circumstances in which wholly lawful conduct might justify the suspicion that criminal activity was afoot, see *Terry v. Ohio*, supra at 27-28, 20 L ED 2d

889, 88 S Ct 1868, 44 Ohio Ops 3rd 383, this is not such a case.

448 U.S. at 441.

The Respondent submits that the indicia of the drug courier profile relied upon by the narcotics officers in the instant case are characteristic of wholly innocent behavior and do not justify the initial stop and conversation by the officers with the Respondent.

The Respondent does not contend that the narcotics officers could not have confronted the Respondent in any manner without an articulable suspicion; rather it is the type and manner of the initial confrontation which is prohibited by the Fourth Amedment. As Justice White stated in the concurring opinion in *Terry v. Ohio*, 392 U.S. 1, 34 (1968), "[t]here is nothing in the Constitution to prevent a policeman from addressing questions to anyone on the streets." Although a police officer can "address questions" to any individual, the individual cannot be stopped, nor can the individual even be required to answer such questions. In fact, he can ignore the officer and walk away. However, an investigative stop such as the one which occurred in the instant case must be based on a reasonable suspicion that the person is involved in criminal activity, and such reasonable suspicion must stem from specific articulable facts. *Reid v. Georgia*, 448 U.S. 438 (1980). In striking down random vehicle stops in *Delaware v. Prouse*, 440 U.S. 648 (1979), this Court held that even a license and registration check require an articulable and reasonable suspicion that a law is being violated. Additionally, this Court found that a Texas statute allowing an officer to detain an individual and require the individual to identify himself

was unconstitutional because reasonable suspicion of criminal conduct was not required by the statute. *Brown v. Texas*, 443 U.S. 47 (1979).

In the instant case, the narcotics officers did not merely "address questions" to the Respondent which the Respondent could have ignored without stopping. After identifying themselves as narcotics officers, one of the officers stated that he "had reason to suspect he [Respondent] was transporting narcotics." (A. 44). Although it is certainly arguable that even at this point an unlimited detention or arrest occurred, such a warning and conversation amounted to at least a brief seizure or investigative detention. The Respondent submits that the officers did not have reasonable suspicions for an investigative stop, and certainly had no probable cause for an unlimited detention or an arrest. In addition to telling the Respondent that he was suspected of transporting narcotics, the officers took both the Respondent's baggage stubs and ticket without returning them to him. (A. 55, 58, 65, 71, 79). Respondent submits that such actions actually constituted an arrest (see Point II), but in no way can they be seen as less than a *Terry* stop and seizure. The questioning of the Respondent alone is at least comparable to the license and registration check in *Delaware v. Prouse*, *supra*, and the request for identification in *Brown*, both held to require an articulable and reasonable suspicion that the individual being detained had violated a law.

The basis for the initial confrontation and stop by the narcotics officers with the Respondent was simply insufficient to constitute the articulable suspicion required to constitute a stop under *Terry v. Ohio*, 392 U.S. 1 (1968). As stated in *Reid*, manifestation of a few of the

drug courier profile characteristics, without more, does not support a finding of reasonable suspicion. *Accord, United States v. Morin*, 665 F.2d 765 (5th Cir. 1982).

Although neither officer had received any prior information linking the Respondent to criminal activity, their suspicions were aroused by certain observations. (A. 28). Officer Johnson testified that he and Officer Magdelena were watching the Respondent carefully and suspected him of drug trafficking due to (1) his age, (2) his nervousness, (3) his use of American Tourister suitcases[1] and (4) the fact that he had paid for his airline ticket in cash. (A. 27-36). As a matter of law, such observations are insufficient to warrant the narcotics officer stopping the Respondent. These alleged "drug courier profile characteristics" are similar to those relied upon by the agent in *Reid* where the Court held that:

> . . . [these] circumstances describe a very large category of presumably *innocent travelers* who *would be subject to virtually random seizures* were the Court to conclude that as little foundation as there was in this case could justify a seizure. (emphasis added).
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> 448 U.S. at 441.

The profile characteristics relied upon by the narcotics officers in the instant case are quite analagous to those followed by the DEA agent in the *Reid* case; and in neither case were they sufficient to justify an investigative stop. In *Reid*, the DEA agent confronted

[1]The officer testified that ". . . American Tourister suitcases seemed to be standard issue for marijuana smuggling." (A. 29).

the defendant because (1) the defendant had arrived from a "source city," (2) the defendant arrived in the early morning, (3) the defendant and his companion appeared to be concealing the fact that they were traveling together, and (4) the defendant and his companion had no luggage other than shoulder bags. 448 U.S. at 441. Clearly, the Respondent's age, nervousness, and use of American Tourister luggage was no more suspicious than those characteristics dismissed by this Court in *Reid* as being "too slender a reed to support the seizure in this case." *Id.* The additional fact that the Respondent paid for his ticket in cash adds no more credence to the officers' conduct or alleged suspicions.[2]

The instant case is more analagous to the situation in *Sibron v. New York*, 392 U.S. 40 (1968), where the seizure was held to be illegal, than that of *Terry*, in which the Court held that the officers' actions were justified. In *Terry*, the Court found that the stop and pat down of the defendant's clothing was proper and indeed good police work. However, in the companion case of *Sibron*, the Court held that the police officer did not have sufficient basis for a search of the defendant where the officer relied merely on certain conversations with drug addicts and a conversation with the defendant prior to the search.

Like *Sibron*, the instant case involves a narcotics search and, unlike *Terry*, the stop of the Respondent

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[2]Although the Respondent did not remember exactly how much he paid for his one-way ticket, fares from Miami to New York City during this time ranged from $50 to $100. Surely the cash payment of such a relatively small sum is hardly a suspicious circumstance.

did not involve a weapons search. Professor LaFave maintains that the seriousness of the crime suspected in *Terry*, armed robbery, versus a narcotics offense in *Sibron* may have been one of the reasons for the different results. *See* 3 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* §9.1, at 14 n. 51 (1978). Another writer, Professor Whitebread, argued that the motive of the officer in *Terry* in searching for a weapon as opposed to the officer in *Sibron*, who was merely looking for an object not dangerous to the officer is another important distinguishing factor. C. Whitebread, *Criminal Procedure: An Analysis of Constitutional Cases Concepts* 175 (1980). *See also* Gaswirth, *Reformulating Seizures—Airport Drug Stops and the Fourth Amendment*, 69 CALIF. L. REV. 1486, 1494-1495 n. 7 (1981). Unlike *Terry*, the case at bar did not involve a violent crime such as armed robbery, and like *Sibron* it did not involve a weapons search by police officers.

In both *Reid* and the instant case, wholly innocent behavior, characterizing a great many airport travelers, were improperly relied upon to justify an investigative detention of a suspect. Although it is clear that police may detain a person for investigative purposes not amounting to an arrest on the basis of reasonable suspicions that he is engaged in criminal activity, the activities of the Respondent in the instant case simply do not meet that threshold. As a result, the initial detention by the narcotics officers was a violation of the Fourth Amendment and constituted an illegal stop. The taint of this illegal stop requires that the subsequent illegal arrest and seizure must be suppressed as fruits of the illegal stop. *Wong Sun v. United States*, 371 U.S. 471 (1963).

B. **The drug courier profile has extremely limited usefulness, if any, in law enforcement but in no case should it be used to warrant more than a mere contact based upon unfounded suspicion.**

There are two major issues which this Court must address when considering the use of the so-called drug courier profile. The first issue is whether the drug courier profile should be approved by this Court to be utilized in any formal way by narcotics officers. Such an endorsement could have further dangerous ramifications with regard to the use of criminal "profiles" for other offenses. The second issue arises if the Court decides that the drug courier profile should not be disregarded entirely. The question then remains, to what degree the profile should be used; i.e., does compliance constitute unfounded suspicion, articulable suspicion, or does it amount to probable cause?

The Respondent respectfully suggests that a judicial endorsement of the drug courier profile may result in further consequences, severely restrictive of individual freedoms in circumstances other than those presently before the Court. The drug courier profile is no more than a statistical compilation of certain physical characteristics and idiosyncracies. As this Court has already stated in *Reid*, most of these characteristics are completely compatible with innocent behavior. The characteristics allegedly displayed by the Respondent in the instant case include nervousness, close scrutiny of his luggage, use of American Tourister luggage, and payment of an airline ticket in cash. (A. 29, 34, 35). By approving formal use of such a profile, all individuals using American Tourister luggage, looking nervous before departing on a plane, watching their bags carefully

and paying for tickets in cash will be subject to some degree of police intrusion. The extent of this intrusion is the second issue which needs to be considered by the Court.

While it may appear that statistical analyses of known criminals are useful tools in apprehending other suspected criminals, it is important to look more deeply into the consequences of such a theory. If a computer were to analyze the average characteristics of the rapist, pornographer, tax evader, embezzler, corrupt politician, etc., nearly every person in America would fall into one of these characteristic categories. Any endorsement of the use of the drug courier profile would encourage further profiles for virtually every conceivable criminal offense. The stopping of narcotics traffic is surely not the only crime problem facing America. But the widespread use of criminal profiles would subject nearly every American to police intrusion due to one's displaying of wholly innocent behavior.

The Respondent does not suggest that trained police officers should ignore their own experience. However, the approval of a statistical checklist fitting the "average" drug smuggler could actually impede the free use of a narcotics officer's experience and could also result in the ignoring of drug smugglers not fitting into the "typical" drug courier mold. Further, undue emphasis on statistical compilation of "average" criminal behavior could have widespread and severely restrictive ramifications for all Americans. Police intrusions based upon computer determined probabilities have tremendous potential for abuse and selective enforcement. We have no way of knowing the present extent to which the constitutional rights of innocent

airport travelers are being abused on a daily basis by the use of the profile in the unlawful detaining and/or searching of passengers by narcotics officers in airports across the country.

If, however, this Court were to hold that the drug courier profile does have some place in law enforcement, the next question which must be considered is the degree to which the profile should be utilized. The original panel decision in the instant case, later reversed by a unanimous en banc court, actually held that compliance with the drug courier profile amounted to *probable cause to arrest.* The original panel decision helds as follows:

> *The rationale of the ruling in this case is that when trained officers spot a departing air travel passenger who with his luggage fit the profile of a drug courier carrier, giving them probable cause* to believe the person is transporting contraband, thereby the *officers will have probable cause to arrest* the person without warrant . . . (emphasis added).
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> 389 So.2d at 1012

As set forth above, the original panel decision, without support from any other courts in this country, went so far as to find that compliance with certain aspects of the drug courier profile subjected an individual to actual arrest. This would be one of the most extreme intrusions upon one's personal freedom and one which must surely be rejected by this Court, as it was by the unanimous en banc Florida appellate court.

Not only should the finding of probable cause based upon compliance with a drug courier profile be rejected by the Court, but in addition, Respondent submits that drug courier characteristics are also insufficient to establish reasonable suspicion for an investigative stop as has already been held in the *Reid* case. In the brief for the United States, it is stated that the use of a drug courier profile to find reasonable suspicion of criminal activity is not inconsistent with the *Reid* decision. (Brief for United States at 30). Respondent submits, however, that the characteristics demonstrated in the instant case are certainly no more indicative of criminal behavior than those in *Reid* which the court found "too slender a reed" to support an investigative seizure. As set forth in more detail in the foregoing, it is clear that no meaningful distinction can be made between the characteristics this Court felt were insufficient to justify an investigative stop in *Reid* and those demonstrated by the Respondent below. (See Brief for Respondent at 11-12).

It is the Respondent's position that if the profile is approved by this Court to be utilized in any manner, it must be used only to establish the lowest degree of "suspicion," allowing an officer to make an initial contact only. This contact is the least intrusive encounter a police officer can make and at this level of contact, confrontation is entirely dependent upon the suspect's voluntary cooperation. When making such a contact, the officer can identify himself, but cannot demand anything nor can he seize or detain a suspect even

temporarily.[3] If the drug courier profile is approved by this Court in any manner, it should be approved to reach the degree of intrusion required for a mere "contact" only.

II.

EVEN IF THE INITIAL CONFRONTATION AND STOP WAS NOT UNLAWFUL, SUBSEQUENT ACTIONS OF THE NARCOTICS OFFICERS DEMONSTRATE THAT THE RESPONDENT WAS ARRESTED IN VIOLATION OF THE FOURTH AMENDMENT WHERE THERE WAS NO SHOWING OF PROBABLE CAUSE PRIOR TO THE SEARCH OF RESPONDENT'S BAG.

A. Each of several actions of the narcotics officers sufficiently restrained the freedom of the Respondent to amount to an arrest, absent probable cause.

Although each of several actions of the narcotics officers subsequent to the initial confrontation with the Respondent would individually constitute a basis

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[3]The DEA "Handbook" prepared by the Justice Department states that even a "contact" requires "some suspicion of criminal activity." It further states that:

> A DEA agent, unlike a Customs Inspector, cannot make airport "contacts" on a random basis. Nor should a "contact" be made solely on a mere hunch. Since the majority of airline passengers are legitimate travelers, such a practice would not be received favorably by the courts.

"Legal Problems in Airport Interception of Domestic Drug Couriers," p.125.

for finding that the Respondent was arrested, collectively there can scarcely be a more classic case for the finding of an arrest than the instant circumstances. The Florida Appellate Court stated that the case presented an "almost classic definition of imprisonment." 389 So.2d at 1018.

First of all, the officers identified themselves to the Respondent as narcotics officers and stated that they suspected him of transporting narcotics. (A. 44). As a result, it is clear that the investigation was focused on the Respondent and his ability to simply walk away from the encounter is already in question.

Secondly, the officers took both Respondent's ticket and baggage stubs and retrieved his luggage for him. (A. 65, 66). The ticket and luggage were never returned nor offered to him and one of the officers admitted that the Respondent could not leave without at least his ticket. (A. 67, 71, 80).

Respondent was then taken to an interrogation room without the ticket or bags in his possession. On the way to the room, one of the officers told the Respondent that they had been waiting all morning for him and asked how much pot was in the bags. (A. 84).

Upon the occurrence of any one of these circumstances, a reasonable person would objectively conclude that he was not free to leave and, as a result, an arrest occurred. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

Upon the initial confrontation and detention by the officers, the Respondent was told he was speaking

to narcotics officers who "had reason to suspect he was transporting narcotics." (R. 26). The courts have held that one of the most compelling factors in determining whether a "seizure" has occurred is whether the focus of the investigation has centered on an individual. *Brown v. Beto*, 468 F.2d 1284 (5th Cir. 1972); *United States v. Phelps*, 443 F.2d 246 (5th Cir. 1971).[4] By advising

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[4]In *Phelps, supra*, at 247-248, the Fifth Circuit noted that:

> . . . throughout the decisions one of these factors has consistently impressed our court: whether or not the focus of the investigation has finally centered on the defendant. In *Miranda* itself the Supreme Court explained that "in custody" was a short-hand phrase for what *Escobedo v. Illinois*, 1964, 378 U.S. 478, 490, 84 S.Ct. 1758, 12 L.Ed.2d 977, described as an investigation which has focused on an accused. Similarly, in *Windsor v. United States, supra*, 389 F.2d at 533, we held that *Miranda* was applicable since
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> > "The obvious purpose of the agents interrogating him was to elicit an incriminating statement for 'the investigation was no longer a general inquiry into an unsolved crime' but has begun 'to focus on a particular suspect' namely, Windsor."

In *Bendelow v. United States*, 5 Cir. 1969, 418 F.2d 42, 47, we said:

> "We agree with the trial judge that after Hart (the police officer) discovered the alterations in the license the investigation focused upon Bendelow and a *Miranda* warning was in order before any statement by Bendelow would be admissible."

See also, United States v. Montos, supra, 421 F.2d at 223, where we held that the defendant had not been subjected to custodial interrogation because the investigation, rather than focusing on the defendant, was still in the general investigatory stage of "screening crime from mishap," and *United States v. Akin*, 5 Cir. 1970, 435 F.2d 1011, where we held that *Miranda* did not apply because the investigation was still at an early non-accusatory stage.

Respondent that he was supected of transporting narcotics, the investigation had centered upon him. Would an individual reasonably believe that he was free to go where narcotics officers confront him, identify themselves, and tell him that he is suspected of transporting narcotics? Respondent submits that the statements made to the Respondent by the narcotics officers alone amount to an unlimited detention and seizure, i.e., an arrest.

Not only did the narcotics officers advise the Respondent that he was suspected of transporting narcotics, but they also took his ticket and baggage stubs, retrieved his luggage for him, and never returned nor offered the ticket or luggage to him again. (A. 65, 66, 69, 71, 81). Although the narcotics officers seized both the Respondent's ticket and baggage, either seizure was sufficient to also constitute an arrest of the Respondent. As this Court stated in *Mendenhall*, where the Respondent was not found to be seized, ". . . *her ticket and identification were returned to her* before she was asked to accompany the officers." 446 U.S. at 558 (emphasis added).[5] In the instant case, the narcotics officer testified that the ticket was never offered nor

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[5]It should be noted that in the "Handbook" prepared by the Justice Department for DEA agents, agents are clearly instructed:

> Return ticket and/or ID *immediately.* Unless you quickly return the ticket and/or ID to the suspect, the defense attorney may be successful in arguing that his client was not free to leave at this point, since you were holding his travel papers.

"Legal Problems in Airport Interceptions of Domestic Drug Couriers," p. 129. (emphasis in original).

returned to the Respondent and the officer further admitted that the Respondent could not leave without it. (A. 68.) The ticket remained in the interrogation room while the baggage was retrieved. (A. 71).

Additionally, either the seizure of the baggage stubs or the actual baggage constituted an arrest of the Respondent. In *United States v. McCain*, 556 F.2d 253, 255 (5th Cir. 1977), the defendant was in a supervisor's room while her bag was being held, and since she was

> . . . able to leave only if she was willing to abandon her luggage, . . . this itself is a sufficient restriction on one's freedom of action so as to trigger the giving of *Miranda* warnings. . . .

The seizure of a suspect's baggage goes ". . . far beyond a mere investigative stop and amount[s] to a violation of his Fourth Amendment rights." *United States v. Place*, 660 F.2d 44, 50 (2d Cir. 1981). The failure of the narcotics officers to return or offer to return the Respondent's baggage stubs or luggage unquestionably resulted in a seizure of the Respondent requiring probable cause. Since he was unable to leave without his baggage, his freedom was clearly restricted.

The factual circumstances regarding the obtaining and retention of the Respondent's luggage by the officers clearly demonstrate the severe restriction of the Respondent's freedom. While one officer "took" the Respondent to the interrogation room, the other officer went downstairs to get the bags. (A. 66). There was absolutely no evidence that the Respondent consented to the retrieval of his luggage by the officer. The narcotics officer watched the Respondent and stayed with him in

the room while the other officer was picking up the suitcases. (A. 67, 70). The Respondent was never told he could leave the room (A. 72) and indeed no reasonably minded person would believe that he could leave even without his ticket or baggage. The actions of the officers went far beyond the parameters of an investigative stop.

The taking of the Respondent to an interrogation room, the activities of the narcotics officers on the way to and inside the room, as well as the physical make-up of the room, also demonstrate that the Respondent was not free to go and was, in fact, seized. An investigative stop, as opposed to a seizure, should be limited to the locale in which the suspect was found and/or baggage located. *Terry, supra.* Where a suspect has been removed from the initial location of contact to another place, even briefly, it has been held to be an illegal seizure. *Dunaway v. New York*, 442 U.S. 200 (1979); *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977) (taking suspects to private office held to be an arrest). As in *Dunaway*, the officers in the instant case made use of an interrogation room and failed to tell the Respondent that he was free to go. (R. 43). Additionally, as in *Dunaway*, the Respondent would not have been allowed to depart had he attempted to do so. *The State conceded this point at oral argument. See Royer v. State*, 389 So.2d 1007, 1018 (Fla.3d DCA 1980).

Pursuant to the officers' request, the Respondent accompanied them to an interrogation room because as the Respondent stated: ". . . they were police officers and I felt that that's what I had to do." (A. 79). The Respondent did not believe that he had a right to leave at that time (A. 82), or later in the interrogation room.

(A. 84). Given the totality of the circumstances, the Respondent's subjective reactions were reasonable and understandable. On the way to the interrogation room, the Respondent stated that one officer said that they had been waiting for him all morning and asked how much pot was in the bags. (A. 84). This same officer told the Respondent that he "must be crazy to try to do this because there were always guards around." (A. 84). While he was in the room, the Respondent neither had access to his ticket nor his bags. He had previously been told that he was suspected of transporting narcotics and was also told that the officers had been waiting for him all morning. It is simply inconceivable that an individual given these circumstances could have reasonably believed that he was free to go. Therefore, the Respondent was effectively arrested.

The physical make-up of the room and the absence of other individuals contributed to the coercive atmosphere and the belief by the Respondent that he could not leave. The interrogation room was actually a converted closet. (A. 45). The only persons in the room were two narcotics officers and the Respondent. (A. 70). The Respondent had access to neither his ticket nor his baggage. If one adds the fact that the Respondent had already been told he was suspected of transporting narcotics, it is absurd to believe that the Respondent could have believed that he was free to leave the room at any time.

Although it may be difficult, if not impossible, to pinpoint the exact "magical moment" at which the Respondent was seized by the police, it is not necessary to make this determination. The totality of the circumstances clearly indicate that at some point prior

to the search of the Respondent's suitcases, he was unconditionally seized, restrained, and arrested by the narcotics officers. Although there is case law holding that (1) accusatory statements made by the narcotics officers to the Respondent, (2) the seizure of the ticket, (3) the seizure of the baggage stubs and baggage or the (4) taking of the Respondent to an interrogation room; can each result in the arrest of an individual, the combination of these circumstances certainly demonstrate that at some point prior to the search, a seizure occurred. It is not necessary to determine the exact moment the Respondent was seized as long as the totality of the circumstances demonstrate that an unconditional seizure took place at some time prior to the search of the luggage.

B. Even by singling out certain aspects of the entire episode, neither the Petitioner nor the United States can effectively excuse the actions of the narcotics officers who arrested the Respondent without probable cause.

The Petitioner places unwarranted emphasis upon the officers' discovery that the Respondent's identification contained a different name than that on his airline ticket or luggage. Although such a discrepancy may arguably be suspicious, the Respondent's explanation for the difference in the names was reasonable and sufficient to allay any suspicions or fears the officers might have felt. When asked why he was not travelling under the name appearing on his driver's license, the Respondent replied that a friend had made the reservations for him in a different name. (A. 43, 82). Additionally, the fact that the identification tag affixed to his baggage contained the same name as his airline

ticket is not indicative of suspicious behavior in view of the Respondent's reply. It is logical and reasonable to use the same name on baggage as that in which the ticket was reserved and written. If bags were lost, the name on the bags could be much more easily traced to the name recorded for the ticket than to the name of the individual actually using the ticket.

The Respondent's explanation is in sharp contrast to the *Mendenhall* case where the defendant, when asked why the ticket bore a name different than her own, responded that she "just felt like using that name." 446 U.S. 544, 548. The Respondent in the instant case, however, gave an immediate, logical and consistent explanation for the discrepancy.

In its brief, the United States unconvincingly attempts to minimize the officers' retention of the Respondent's luggage and tickets by pointing to the "brevity" of the detention. The period of time in which the Respondent's ticket and luggage were detained is only one small factor among the totality and general tenor of the entire episode from which the question of whether an arrest occurred should be determined. For example, the placing of handcuffs on an individual takes a matter of seconds, but it is quite clear that the individual's freedom is sufficiently restrained to constitute an arrest. The actions of the officers and the reasonable perception of the Respondent are more important than the number of minutes involved in the instant confrontation. A mere conversation with the Respondent in the concourse might arguably be no more than a brief detention permissible if reasonable suspicion was present. However, the retention of the Respondent's ticket and luggage as well as the taking of the Respondent

to an interrogation room are clearly more significant than the fact that the entire episode may have encompassed no more than fifteen minutes. (A. 50). Such circumstances amounted to an arrest and seizure of the Respondent notwithstanding the time element. A *Terry* stop is one which is temporary and limited. The above-stated circumstances demonstrate that the actions of the instant officers were certainly not limited nor brief.

C. The Respondent did not consent to the search or seizure and any alleged consent is presumed invalid as the product of an illegal arrest.

The United States also claims, without factual or legal basis, that "there is no reason to conclude that Respondent's consent to search was a product of the retrieval of his luggage." (Brief for the United States at 16). First of all, the testimony regarding the alleged consent is extremely equivocal. While in the interrogation room with the two narcotics officers, one of the officers testified that he told Respondent "We would like him to open the suitcases." (A. 47). The officer testified when asked what the Respondent said at that time, "He was extremely nervous about it and *he didn't say anything specifically that I can recall.*" (emphasis added). (A. 47, 48). Although the officer later testified that the Respondent silently produced a key out of his pocket, it is highly questionable whether such an action, even in a light most favorable to the State, constituted a free, unequivocal and uncoerced consent to search the suitcases.

Secondly, the contention of the United States with regard to the lack of basis for the conclusion that the

Respondent's consent to search was a "product" of the officers retaining his luggage is irrelevant and without legal import. The law maintains that a consent is *presumed* invalid unless an attenuation dispels the taint of an illegal arrest. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); *Bumper v. North Carolina*, 391 U.S. 543 (1968); *See also Johnson v. Zerbst*, 304 U.S. 458 (1938) (presumption against waiver of constitutional rights). Therefore, it is the *State's burden* to demonstrate that *any alleged consent is not a product* of the illegal arrest rather than the Respondent's burden to demonstrate that it was. In the instant case, the alleged consent was secured while Respondent's ticket and luggage were being detained by the officers. As a result, there was certainly no attenuation or intervening circumstances between the illegal arrest and the alleged consent. Lastly, there could never be direct evidence that an alleged consent was the proximate result of illegal actions other than an individual's subjective statement that he consented because of the prior illegal activities of the police officers. The instant Respondent clearly testified that he did not give the officers permission to take or search his suitcases, and that he did what they asked because he felt he was compelled by the officers' actions to do so. (A. 82, 83, 86).

D. The absence of probable cause for the arrest of the Respondent is as equally apparent as is the existence of an arrest.

Not only is the presence of an arrest clearly indicated by the facts of the case, but the lack of probable cause to effectuate such an arrest is also obvious. The only basis for the detention of the Respondent was his compliance with some of the characteristics of a drug

courier profile. There is absolutely no legal basis to conclude that mere similarities with certain seemingly innocuous characteristics of a drug courier profile amount to probable cause to arrest. However, in the instant case the arresting officer unequivocally admitted in the trial Court that *no probable cause existed prior to the actual discovery of the contents of the baggage.* (A. 57). Additionally, neither the brief for the Petitioner nor the United States specifically maintains that probable cause was present. Both the Petitioner and the United States assert that no arrest occurred, and that the intrusion of the officers with regard to the freedom of the Respondent was minimal and reasonable under the circumstances.

The crux of this issue on appeal is whether the Respondent was seized by the narcotics officers and if so, was there a reasonable basis for the seizure. If in fact this Court finds that the Respondent was unconditionally seized (arrested), this Court must also find that such seizure was without probable cause, and therefore illegal and violative of the Fourth Amendment. Secondarily, the Respondent submits that even if this Court finds that only a limited detention occurred, this too was illegal due to the absence of a well-founded suspicion that criminal activity was afoot.

III.

THE STATE FAILED TO TIMELY RAISE ITS CLAIM FOR A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE. ADDITIONALLY, SUCH AN EXCEPTION IS NOT PERMISSABLE UNDER THE INSTANT FACTS AND SHOULD NOT BE ADOPTED IN ANY CASE.

A. The Petitioner is precluded from asserting a "good faith exception" to the exclusionary rule on appeal to the Supreme Court where the issue was never raised below and was therefore waived by the Petitioner.

Section 1 of the Petitioner's brief is a frontal attack on the exclusionary rule and an attempt to carve out a "good faith exception." However, it is a basic tenet of appellate jurisprudence that an appellant is precluded from raising points on appeal to a higher Court where such points were not first raised below. *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232 (1949); *Bonded Transportation, Inc. v. Lee*, 336 So.2d 1132 (Fla. 1976). In the instant case, the Petitioner at no time challenged the existence or propriety of the exclusionary rule. As a result, the Petitioner has waived any claim or right he might have had to make such an argument before the Court at this time.

The failure of the Petitioner to raise this argument below prevented the state courts from having an opportunity to consider the argument or to make a determination with regard to it. The state courts were

never given a chance to address this issue nor to hear argument of counsel.

B. None of the factors cited by the *Williams* court in favor of a "good faith exception" are present in the instant case.

In its haste to urge this Court to adopt a good faith exception to the exclusionary rule, Petitioner ignores both the facts of the instant case and the factors set forth in *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980), an opinion upon which the State relies. *Williams* held that evidence seized pursuant to an unlawful arrest is admissible at trial when the officer making the arrest acted in good faith and with the reasonable, though mistaken, belief that he was so authorized to make the arrest.[6]

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[6]It should be noted at this juncture that there were two majority holdings in *U.S. v. Williams*. The proposition for which *Williams, supra*, is cited for in the text is the holding embodied in Part II of the opinion. The Part I opinion reversed the suppression of the evidence by the District Court on the grounds that the agent was authorized by statute to arrest the defendant. The first majority held that violation of the defendant's bond restriction constituted criminal contempt under 18 U.S.C. §401(3) (1976) and that, therefore, the agent was empowered to arrest the defendant under 21 U.S.C. §868(3) (1976). Thus, the first majority reasoned, the evidence was obtained by a search incident to a lawful arrest.

The Part II majority did not concur in this interpretation of the aforementioned statutes, instead finding the evidence involved was admissible regardless of whether the officer had authority to arrest insofar as the officer reasonably and in good faith believed that he possessed the necessary authority to make the arrest. Hence, the good faith exception.

The good faith exception carved out by the *Williams* court contains two facets, neither of which are applicable to the instant case.

The first, which the court termed the "technical violation facet," occurs when law enforcement officials rely, in good faith, on a statute that is later declared unconstitutional, an interpretation of a statute that is later construed differently, or a warrant that is later declared invalid. *See also Brown v. Illinois*, 422 U.S. 590, 610-612 (1975) (Powell, J., *concurring*). It does not appear of record, nor does Petitioner anywhere contend, that any such circumstances are present in the instant case. Therefore, a good faith exception cannot be advanced under this rationale.

The second facet of the good faith exception under *Williams* applies when an officer makes a judgmental error concerning the existence of facts sufficient to consitute probable cause. This, the court termed, the "good faith mistake facet." However, it is equally clear that this facet has no application to the instant case. As noted above, this facet deals with the situation where an officer mistakenly believes that certain facts give rise to probable cause. However, in the case at bar, *the arresting officer admitted that he had no probable cause to arrest prior to the actual search of the baggage.* (A. 57). Never did he maintain that he mistakenly believed there was probable cause to search. The court in *Williams* warned of this exact situation:

> *Exclusion of evidence seized without any probable cause is an entirely different question* from suppression of evidence seized upon a

good faith and reasonable belief in the existence of probable cause. (emphasis added).

622 F.2d at 846

Any argument for adoption of a good faith exception to the exclusionary rule should at least be limited to that situation which would warrant its application. Adopting such an exception in the instant case, where admittedly no probable cause to stop or search was present, can only portend substantial evisceration of the Fourth Amendment. The touchstone of the Fourth Amendment's protection of privacy interests and prohibition against unreasonable police searches and seizures is the requirement that such police intrusions be based upon probable cause. *Michigan v. DeFillipio*, 443 U.S. 31, 43 (1979). Accordingly, the State's attempt to urge a good faith exception to the exclusionary rule must fail in this case, even under the authority the State cites in its support.

C. This Court should not adopt a good faith exception to the exclusionary rule under any circumstances.

It has been stated, and Respondent submits, that the *Williams* court overshot its mark in carving out the good faith mistake exception to the exclusionary rule. *See Williams, supra*, at 848, (Rubin, J., *specially concurring*); Comment, *Constitutional Law: The Fifth Circuit's "Good Faith" Exception to the Exclusionary Rule—Well-Reached or Overreached?*, 33 U. FLA. L. REV. 300 (1981). While adequate authority existed for the court's adoption of the technical violation facet of

the exception,[7] a concomitant dearth of direct precedent existed for the good faith mistake facet. In fact, the four cases cited in support of this facet all contain aspects of the technical violation facet and not an officer's own mistaken perception of probable cause. In *United States v. Janis*, 428 U.S. 433 (1976) this Court refused to exclude evidence that had been obtained by police in good-faith reliance on a search warrant later found defective. Similarly, in *United States v. Hill*, 500 F.2d 315 (5th Cir. 1974), *cert. denied*, 420 U.S. 931 (1975), the Fifth Circuit admitted evidence obtained in a search although the warrant was technically improper. In *Michigan v. Tucker*, 417 U.S. 433 (1974), this Court refused to exclude evidence obtained from an accused who was given only a partial *Miranda*-type warning

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[7]The Fifth Circuit relied upon the following cases in support of the technical violation facet: *United States v. Peltier*, 422 U.S. 531 (1975) (evidence seized in a good-faith border search without a warrant under a statutory construction that was subsequently held unconstitutional held admissible); *Michigan v. DeFillipio*, 443 U.S. 31 (1979) (evidence seized pursuant to a good faith arrest with probable cause for violation of a law later declared unconstitutional held admissible); *United States v. Cardena*, 529 F.2d 443 (5th Cir. 1976) *cert. denied*, 429 U.S. 848 (1976), *modified on other grounds sub nom. United States v. Ashley*, 569 F.2d 975, 979 (5th Cir.) *cert. denied*, 439 U.S. 853 (1978) (evidence seized pursuant to an arrest and search made in good faith under a statute later declared invalid held admissible); *United States v. Kilgen*, 445 F.2d 287 (5th Cir. 1971) (confession obtained pursuant to a good faith arrest under a vagrancy ordinance later held invalid was admissible).

In light of the authority supporting the technical violation facet, Respondent does not necessarily quarrel with such an exception. However, Respondent maintains that adoption of this facet of the good faith exception would be manifestly inappropriate in this case insofar as there are absolutely no facts in the case at bar to trigger its application.

during an interrogation which occurred before the *Miranda* decision, although the trial came afterwards.[8] Finally, in *United States v. Wolffs*, 594 F.2d 77 (5th Cir. 1979), the Fifth Circuit refused to exclude evidence, not because the officers mistakenly perceived probable cause, but rather because their violation of the pertinent statute was an isolated act, committed in good faith.

The serious deficiencies of the *Williams* decision and the Fifth Circuit's willingness to adopt a good faith exception under such inauspicious circumstances has led one commentator to remark:

> Had the Part II majority limited its exclusionary rule exception to technical violations, which under the facts of the instant case and supporting authority would have been appropriate, the dangers in this decision might have been avoided. A technical violation, almost by definition, assures that an officer acted in reasonable good faith. The good faith and reasonableness of the officer are objectively demonstrated by his reliance on a statute or other authority. The good faith mistake facet of the exception articulated by the Part II majority, however, does not lend itself to such assurances of reasonableness and good faith. Instead, it creates opportunity for abuse at two levels. First, a law enforcement officer who has knowingly made an unlawful arrest or search may later claim that he was acting

[8]The police complied fully with the mandate of *Escobedo v. Illinois*, 378 U.S. 478 (1964), the controlling precedent at the time the warnings were given. 417 U.S. at 447.

> in good faith. Second, the court deciding such good faith claims has wide discretion in applying the exclusionary rule. The potential for abuse is heightened by the Part II majority's failure to fashion a test for the establishment of reasonable good faith and failure to articulate the burden of proof. (footnotes omitted).
>
> Comment, *supra*, at 311.

The State of Florida urges this Court to repeat the error of the Fifth Circuit, while Florida's own appellate courts have repeatedly declined the invitation. *State v. Thomas*, 405 So.2d 462 (Fla.3d DCA 1981); *Moline v. State*, 404 So.2d 826 (Fla.1st DCA 1981); *Lovett v. State*, 403 So.2d 1079 (Fla.1st DCA 1981); *Walden v. State*, 397 So.2d 368 (Fla.1st DCA 1981). While Respondent recognizes and respects this Court's past efforts in modifying the exclusionary rule, Respondent submits that a judicial opinion by this Court allowing the admission at trial of evidence unconstitutionally seized where the seizing officer admits he had no probable cause, will certainly forecast the complete demise of the exclusionary rule.

IV.

ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION IS A CONSTITUTIONALLY INCORPORATED EXCLUSIONARY RULE WHICH AFFORDS MORE PROTECTION THAN THE FOURTH AMENDMENT TO THE FEDERAL CONSTITUTION. AS A RESULT, EVIDENCE SEIZED IN VIOLATION OF ARTICLE I, SECTION 12, IS INADMISSIBLE IN FLORIDA COURTS REGARDLESS OF WHETHER OR NOT THE EVIDENCE IN QUESTION WAS OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The keystone of our federal system is the supremacy of the Federal Constitution as embodied in this Court's opinions. Accordingly, state court decisions in conflict with this Court's pronouncements cannot be accorded the force of law. However, it is equally clear that state citizens, through their state constitution, can afford themselves more protection than those protections afforded by the Federal Constitution.[9] The Respondent submits that Article 1, Section 12 of the Florida Constitution imposes a stricter standard upon police conduct than does the Fourth Amendment to the Federal Constitution. Consequently, the state court determination of this state law issue has obviated the need to resolve

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[9]*See generally Pruneyard Shopping Centers v. Robbins*, 447 U.S. 74 (1980); *Cooper v. California*, 386 U.S. 58 (1967); Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). At least one Member of this Court has applauded this "very healthy trend." *Pruneyard Shopping Centers, supra*, at 91 (Marshall, J., *concurring*).

the federal constitutional issues which constitute the bulk of Petitioner's appeal. Accordingly, this Court should abstain from exercising jurisdiction in this case.

The State of Florida's highest court has repeatedly held that Article I, Section 12, of the Florida Constitution,[10] prohibiting unreasonable searches and seizures, is more restrictive than its federal counterpart contained in the Fourth Amendment to the United States Constitution. *Odom v. State*, 403 So.2d 936 (Fla. 1981); *State v. Sarmiento*, 397 So.2d 643 (Fla. 1981); *Grubbs v. State*, 373 So.2d 905 (Fla. 1979). The reason for Florida's stricter standard is obvious and can be found in the last sentence to Article I, Section 12: "Articles or information obtained in violation of this right shall not be admissible in evidence." Thus, the exclusionary rule in Florida is an express constitutional provision and, unlike the Federal exclusionary rule, not a judicially created remedy intended to deter unreasonable police conduct. "In Florida the exclusionary rule is not merely a judicial construct but is written into the Constitution itself." *Croteau v. State*, 334 So.2d 577, 580-581 (Fla. 1976) (Hatchett, J., *concurring*).

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[10]Article 1, §12, Fla. Const. (1968) provides:

> Searches and seizures.—The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. Articles or information obtained in violation of this right shall not be admissible in evidence.

In *Odom, supra*, the Florida Supreme Court found no bar to the introduction of the evidence in question under the United States Constitution. However, the Court found that the admission of the evidence was error under Florida's exclusionary rule. The court remarked:

> Evidence obtained in violation of Article 1, Section 12 is inadmissible in Florida courts. This constitutional principle applies *regardless* of whether the evidence in question was obtained in violation of the Fourth Amendment, and *regardless* of the scope of the Fourth Amendment exclusionary rule. (citations omitted) (emphases added).
>
> 403 So.2d at 940

Similarly, in *State v. Sarmiento, supra*, the Florida Supreme Court held that the warrantless electronic monitoring by state agents of a conversation between the accused and an undercover police officer was in violation of Article 1, Section 12. In response to a dissenting Justice who maintained that the Federal Constitution permitted the type of electronic interception found in that case, the majority declared:

> But surely he would concede that *the citizens of Florida, through their state constitution, may provide themselves with more protection from governmental intrusion than that afforded by the United States Constitution.* A fundamental task of the judiciary is to safeguard the constitutional rights of the citizenry. The criminal justice system must protect the rights

> of the innocent as swiftly and as certainly as it punishes the guilty, less it impinge upon the rights of those whom it, with good intentions, seeks to protect. (emphasis added).
>
> 397 So.2d at 645

Finally, in *Grubbs v. State, supra*, the Florida Supreme Court, in the face of ample federal precedent to the contrary,[11] held the exclusionary rule applicable to probation revocation proceedings.

The State's bald contention that the Florida courts would adopt a good faith exception to the Fourth Amendment if given the chance (Brief for Petitioner at 23) flies in the face of over 50 years of Florida constitutional jurisprudence. *See, e.g., Gildrie v. State*, 94 Fla.134, 113 So.704 (1927); *Accord, Taylor v. State*, 355 So.2d 180 (Fla.3d DCA 1978). It matters little that there exists some authority to the effect that the Fourth Amendment exclusionary rule should be modified or abolished, *Stone v. Powell*, 428 U.S. 465 (1976) (Burger, C.J. *concurring*, White, J., *dissenting*); *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971) (Burger, C.J., *dissenting*); *Brown v. Illinois*, 422 U.S. 590 (1975) (Powell, J., *concurring*), for it is, at best, highly doubtful that any Florida court is constitutionally free to effect such a modification of

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[11] *See, Latta v. Fitzharris*, 521 F.2d 246 (9th Cir.), *cert. denied*, 423 U.S. 897 (1975); *United States v. Farmer*, 512 F.2d 160 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975); *United States ex rel. Lombardino v. Heyd*, 318 F.Supp. 648 (E.D.La. 1970), *aff'd*, 438 F.2d 1027 (5th Cir.), *cert. denied*, 404 U.S. 880 (1971); *United States v. Hill*, 447 F.2d 817 (7th Cir. 1971); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2d Cir. 1970).

Florida's exclusionary rule. Consequently, this inability to alter the exclusionary rule, short of constitutional amendment, is reflected in the reluctance of Florida appellate courts in embracing a good faith exception to the exclusionary rule in the aftermath of *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980). *See State v. Thomas*, 405 So.2d 462 (Fla.3d DCA 1981); *Moline v. State*, 404 So.2d 826 (Fla.1st DCA 1981); *Lovett v. State*, 403 So.2d 1079 (Fla.1st DCA 1981); *Walden v. State*, 397 So.2d 368 (Fla.1st DCA 1981).

More fundamentally, however, this Court is presented with the identical problem as in *South Dakota v. Opperman*, 428 U.S. 364 (1976). In *Opperman, supra*, this Court held that contraband used to convict the defendant had been seized pursuant to an inventory search which was not violative of the Fourth Amendment to the United States Constitution. On remand, the Supreme Court of South Dakota held that the inventory search was unreasonable under their state constitutional provision, even though, admittedly, the language of that provision is almost identical to that found in the Fourth Amendment.[12] *State v. Opperman*, 247 N.W. 2d

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[12]S.D. Const., Art. VI, §11 provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause supported by affidavit, particularly describing the place to be searched and the person or thing to be seized."

U.S. Const. Amend. 4 provides: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized."

673 (S.D. 1976). Thus, this Court decided a federal constitutional issue where there were independent and adequate state grounds for resolution of the case. Understandably, the similarity between the language of the two provisions gave little indication that a different result under the South Dakota constitution would obtain. However, this is not so in the instant case.

As previously demonstrated, the Florida Supreme Court has repeatedly held that Article I, Section 12 of the Florida Constitution imposes a stricter standard on police conduct than does the Fourth Amendment. Moreover, Florida's exclusionary rule is constitutionally required, and not judicially created. It follows inescapably that, should this Court modify the federal exclusionary rule so as to admit into evidence the contraband in question, the Florida Supreme Court, on remand, would be constitutionally obligated under Florida's exclusionary rule to suppress the evidence. Thus, contrary to this Court's long-standing aversion to deciding constitutional issues unnecessarily, a constitutional decision will be reached where the need to reach such a decision is not present. Accordingly, this Court should decline jurisdiction in this case.

V.

THE STATE'S FAILURE TO SECURE A STAY PENDING REVIEW OF THE DISTRICT COURT'S EN BANC DECISION HAS RESULTED IN RESPONDENT'S LAWFUL DISCHARGE FROM CUSTODY THUS RENDERING MOOT THE ISSUES PETITIONER RAISES.

On September 9, 1980, the opinion of the Third District Court of Appeal was filed in the instant case. After the State of Florida's Motion for Stay was denied, the mandate was issued. Subsequent to the mandate, and upon motion by the Respondent, the trial court ordered the discharge of the Respondent (R.A. 1).

No appeal from this Order of Discharge was ever perfected. The Respondent submits that this failure to secure a stay has mooted the issues Petitioner raises in this appeal because Respondent's freedom has been fully restored pursuant to the Order of Discharge and therefore, any re-prosecution of the Respondent would run afoul of double jeopardy. As a result, a decision by this Court holding the stop, arrest and search to be constitutional and, therefore, the evidence admissible, would be ineffectual in that a second prosecution for the same offense would be barred.

The State of Florida is obligated to secure an order staying proceedings in the trial court during the pendency of the State's appeal. *State v. Villavicencio*, 381 So.2d 256 (Fla.4th DCA 1980); Rule 9.140(c)(2), Florida Rules of Appellate Procedure (1978). The failure to

secure such a stay results in the trial court's Order of Discharge being affirmed. *Villavicencio, supra,* at 257.

The facts of *Villavicencio* are strikingly similar to those of the case at bar. In that case, the State of Florida appealed from an order of the trial court discharging the defendants under the provisions of Florida's speedy trial rule. At issue was whether the State was obligated to secure an order staying proceedings in the trial court during the pendency of the State's appeal of an order granting a motion to suppress. The court held that the state was obligated to secure such an order under the express provisions of Rule 9.140(c)(2). The court stated:

> With the adoption of Rule 9.140(c)(2), we now believe that the Supreme Court [of Florida] has resolved any doubts as to the necessity of such an order.
>
> 381 So.2d at 257

Rule 9.140(c)(2) does not equivocate: "An appeal by the State shall stay further proceedings in the lower tribunal *only* by order of the lower tribunal." (emphasis added). Although the Appellate Rules provide for an automatic stay in certain instances, criminal cases are expressly excluded. *See e.g.,* Fla.R.App.P. 9.300(b)(2), ("The timely filing of a notice [of appeal] shall automatically operate as a stay pending review, *except in criminal cases,* when the State . . . seeks review.") (emphasis added). The failure of the Petitioner to secure a stay of the Third District Court of Appeals en banc decision can only result in affirmation of the trial court's Order of Discharge. Such failure to secure a stay pending

review has so altered the posture of the controversy and mooted the issues as to make further judicial response ineffective and inconsequential. Accordingly, this Court should decline to hear this appeal.

CONCLUSION

Based on the foregoing law and argument, Respondent submits that the unanimous en banc Florida appellate court decision should be affirmed.

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RESPONDENT'S APPENDIX I

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 78-200

CRIMINAL DIVISION

STATE OF FLORIDA,

Plaintiff,

vs.

MARK ROYER,

Defendant.

ORDER

THIS CAUSE came on to be heard upon Defendant, MARK ROYER'S ore tenus Motion for Discharge and Motion for Discharge of Surety, and the Court having heard argument of counsel and being otherwise fully advised in the premises it is hereby

ORDERED AND ADJUDGED:

1. Based on the opinion by the Third District Court of Appeal filed September 9, 1980 in the case of *Mark Royer v. State*, Case No. 78-1050 and the Order denying the State's Motion for Stay filed November 26, 1980, the mandate has issued and the Defendant, MARK ROYER, is hereby discharged.

2. Defendant's Motion for Discharge of Surety be and the same is hereby granted.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 16 day of December, 1980.

JUDGE IRA L. DUBITSKY
CIRCUIT COURT JUDGE

COPIES FURNISHED TO:
JOSEPH H. SEROTA, ESQ.
STATE ATTORNEY'S OFFICE
LEONARD SWEELING,
ALLEGHENY MUTUAL CASUALTY COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Reply Brief has been mailed this 23rd day of March, 1982, to Calvin L. Fox, Esq., Assistant Attorney General, 401 N.W. 2nd Avenue, Suite 820, Miami, FL 33128.

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Office - Supreme Court, U.S.
FILED
OCT 6 1982
ALEXANDER L. STEVAS,
CLERK

CASE NO. 80-2146

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

THE STATE OF FLORIDA,

Petitioner,

vs.

MARK ROYER,

Respondent.

On Petition for a Writ of Certiorari to the Third District Court of Appeal of Florida

REPLY BRIEF OF PETITIONER

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I

ARGUMENT

1.) MOOTNESS.

The Defendant contends that because the Defendant has been discharged pursuant to the mandate of the Third District Court of Appeal of Florida in Royer v. State, 389 So.2d 1007 (Fla. 3d DCA 1980), that thereby the cause herein is moot. The State was unsuccessful in both the District Court of Appeal and the Supreme Court of Florida in seeking a stay and by that time, the Defendant had been discharged. See, Respondent's Appendix.

In Sibron v. New York, 392 U.S. 40, at 56-57 (1968) the court explained that, "a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged

conviction." In Carafas v. La Vallee, 391 U.S. 234 (1968), the court refused to find mootness, where the defendant had completed his sentence, because the conviction had potential collateral consequences. In view of the foregoing rationale enabling a defendant to continue to challenge his conviction, in Pennsylvania v. Mimms, 434 U.S. 106, at 109, n.3 (1977) the court reasoned that because of the same potential for collateral consequences, the State likewise could seek to uphold the validity of its convictions even though the defendant had completed his sentence. The principle is sound for, "justice due the accused is also due the accuser." Snyder v. Massachussetts, 291 U.S. 97, at 122 (1933) (Cardoyo, J.).

Under Pennsylvania v. Mimms and Sibron the Defendant's claim of mootness is without basis. The Defendant here has never

even begun to serve his sentence. In the event of a reversal the Third District Court of Appeal of Florida under Florida practice and procedure will simply withdraw its previous mandate and reissue its mandate consistent with the ruling of this Court. Cf., e.g., Abreau v. State, 365 So.2d 201 (Fla. 3d DCA 1978), after remand from, 363 So.2d 1063 (Fla. 1978). Moreover, the collateral consequences of the conviction, which the State seeks to sustain abound. See, § 561.15(2) Fla.Stat. (liquor license); § 562.13(3)(a) Fla.Stat. (manager, bartender); §112.011 Fla.Stat. (licenses, employment); § 552.094(5)(b) Fla.Stat. (license for explosives); §§ 790.06 and 790.23 Fla.Stat. (firearms); § 633.34 Fla.Stat. (employment as firefighter); § 744.474 Fla.Stat. (10) (guardianship); § 550.181 Fla.Stat. (1)(b) (gambling license); § 943.13 Fla.Stat. (law enforcement); § 114.01 Fla.Stat.

(public office); §§ 97.041, 98.201, 98.301 Fla.Stat. (voting); § 921.141(6)(a) Fla. Stat. (death penalty); § 775.084 Fla.Stat. (habitual offenders). It is therefore wholly apparent that the present petition is not feigned, abstract or hypothetical and therefore under Sibron and Mimms the contention of mootness is uttlerly without merit.

2.) STANDARD OF REVIEW.

For the first time in this Honorable Court, the Defendant attempts to assert that the cause herein should be affirmed under a stricter standard of review which he claims is contained in Article I, Section XII of the Florida Constitution. Contrary to the Defendant's analysis, in Hetland v. State, 366 So.2d 831, at 836 (Fla. 2d DCA 1979) the court expressly held that Article I, Section XII of the Florida Constitution does not apply a higher

standard than that of the Fourth Amendment. The Florida Supreme Court in Hetland v. State, 387 So.2d 963 (Fla. 1980), expressly approved and adopted the opinion by the district court of appeal in Hetland. See also, § 933.19 Fla.Stat. [adopting Carroll v. United States, 267 U.S. 132 (1925)]. The constitutional issues herein were presented and fully argued at all levels of the proceedings below in the context of the applicable rules and prohibitions of the United States Constitution.

3.) PRESERVATION OF GOOD FAITH EXCEPTION ARGUMENT.

The Defendant contends in a summary fashion that the State failed to raise the "good faith exception" argument in the Court below and therefore this Honorable Court should not entertain the issue. To the contrary, it was defense counsel who first launched the attack into the officer's good faith in approaching and

arresting the Defendant. See Joint Appendix at 57A-58A. Indeed, the prosecutor was forced to immediately reply upon redirect examination to defense counsel's attack. Id. at 73A-74A. Furthermore, in the State's brief upon en banc rehearing in the Florida Third District Court of Appeal, which has been provided to this Court by the Florida District Court of Appeal, the undersigned vigorously argued the good faith of the officers in responding to the circumstances as they perceived them in their training and experience. See, State Brief En Banc, pp. 38-39; 50-54; 58-72. Finally, in its Petition for a Writ of Certiorari, the State purposely stated its "question presented" in broad terms to emcompass the good faith exception argument and specifically raised the good faith exception argument at pages 28-29 of its brief on jurisdiction. The State submits that therefore the issue of the good

faith exception has been "fairly comprised" by the petition presented, and was fairly presented to the Courts below. See, United v. Mendenhall, 446 U.S. 544 at n.5 (1980).

Moreover, this honorable Court should address this issue as a question of great public importance and consistent with other momentus decisions reached by this Court upon the criminal law in this century. The present question clearly consists of the "exceptional circumstance" wherein this Court has addressed new issues of law. Indeed, an argument could be made that the State could not raise this issue anywhere but the Florida Supreme Court, which declined to accept jurisdiction. See, Walden v. State, 387 So.2d 368 (Fla. 1st DCA 1981).

4.) STATE'S CONCESSION IRRELEVANT.

The Defendant attempts to bolster his argument that he was somehow "seized" by noting that the Florida Third District Court of Appeal states in its opinion that the State "conceded at the oral argument" that the officers in the present case would not have let the Defendant leave the room if he thought he could. See 389 So. 2d at 1018. There is no taped recording of the oral argument in the Florida Third District Court of Appeal. However, the undersigned argued the cause at all levels for the State and submits to this Court that after ten (10) minutes of discussion with the undersigned, the undersigned stated at oral argument only: 1) that neither the undersigned nor the Court was there and therefore should not speculate as o whether or not the Defendant would have left before any further proceedings and 2) that assuming that the circumstances

amounted to articable suspicion, the officers would not have let the Defendant go had he refused consent. Certainly in that event, the officers could have readily sought other means of gathering information including the use of a trained narcotics dog. See United States v. Sullivan, 625 F.2d 9 (4th Cir. 1980); Sizemore v. State, 390 So.2d 401 (Fla. 3d DCA 1980); Harpold v. State, 389 So.2d 279 (Fla. 3d DCA 1980). Furthermore, the State submits that what might have happened if the Defendant had refused consent to open his suitcase is not particularly relevant to proper constitutional analysis. Certainly at that point, the detectives would have had to weigh their facts, experience and consider possible alternatives. Certainly, up to the point of the Defendant's consent to open his suitcase the officers were merely reacting to the Defendant's overt manifestation that the transaction was

voluntary. In Oregon v. Mathiason, 429 U.S. 492 (1977), the court held that Miranda warnings were not required because a defendant spoke with officers at a police station at the request of the officers. The court explained that there was no indication that the questioning of the defendant took place in a context where the defendant's freedom to depart was restricted in any way. Therefore, the defendant was not "in custody" for purposes of requiring Miranda warnings. The court further explained that Miranda warnings would not be required simply because the questioning took place in a police station or because the questioned person is one whom the police suspect. 429 U.S. at 495. In the present case, the Defendant's "apparent spirit of cooperation" and the noncoersive nature of the transaction manifest a conclusion under Mathiason that the Defendant herein was not "in custody" and hence under

arrest as the Defendant contends in his brief before this Court. In fact as noted in the State's brief on the merits, the Defendant himself stated that he was not "under arrest" in the room. See Joint Appendix at 84A. Merely that the Defendant was in the "police room" as the District Court of Appeal referred to it or that the Defendant was a suspect was not sufficient to classify him as being "in custody" under Oregon v. Mathiason.

5.) THE PRESENT TRANSACTION WAS LAWFUL.

The Defendant, relying heavily upon Reid v. Georgia, 448 U.S. 438 (1980) contends that all profile transactions are detentions and that the movement to a room forty (40) feet away for further discussion was an arrest. First of all, a careful reading of Reid v. Georgia reveals that the court quite clearly confined its holding to

the premise that if the judgment of the court was to be predicated upon a Terry "stop" upon the facts stated by the Georgia appellate court, the "stop" was not lawful. Reid made no effort to condemn all transactions based upon the so-called "profile". The Reid court furthermore never reached the issues of consent or contact upon the facts stated in Reid. See, (Powell, Burger, Blackmun, J.J. concurring). A proper analysis of Reid centers upon the fact that the Georgia appellate court rested its holding upon two (2) distinct alternative grounds numbered "1" and "2". See, State v. Reid, 149 Ga.App. 685, 255 S.E. 2d 71 (1979), cert. den., June 20, 1979 (Ga.Sup.Ct.). The second holding in the Georgia appellate court rested upon the fact that the entire transaction in Reid was a mere contact between the officer and the defendants. 255 S.E. 2d at 72-73. This court in Reid left the

foregoing alternative holding in the Georgia appellate court intact, even though the transaction may have begun with a "profile". Reid neither stands for the proposition that all profiles do not amount to articable suspicion or probable cause nor does it stand for the proposition that officers may not contact citizens on the street.

This analysis of Reid has been borne out upon remand after this Court's opinion in Reid. Upon remand, in State v. Reid, 156 Ga.App. 78, 274 S.E.2d 164 (1980) the Georgia appellate court affirmed the suppression of evidence. However, upon review by the Georgia Supreme Court in State v. Reid, 247 Ga. 445, 276 S.E.2d 617 (1981), the court reversed the appellate court finding that the entire transaction was merely a contact and that there was no "seizure". The court observed that there

was no objective reason for the defendants to believe that they were not free to go. On October 5, 1981, this Court denied certiorari. See Reid v. Georgia, ___U.S.___, 102 S.Ct. 369 (1981).

The Defendant also attempts to hypothesize innocent explanations for bits and pieces of the transaction herein as did the Florida Third District Court of Appeal. He reasons therefore that these "affirmative defenses" preclude any finding that the officer's actions in approaching the Defendant or detaining the Defendant or arresting the Defendant were not constitutionally reasonable. The Defendant's proposal of possible innocent explanations for bits and pieces of the transaction herein is not only implausible but constitutes a completely improper standard of constitutional analysis.

The factors observed by the officers should not be isolated but rather should be considered with respect to the totality of the circumstance together with the training and experience of the officers. See United States v. Cortez, 449 U.S. 411 (1981); Draper v. United States, 358 U.S. 307 (1964); Brinegar v. United States, 388 U.S. 160 (1947); United States v. Berry, 670 F.2d 583 (5th Cir. 1982). In Brinegar v. United States, the court explained the fundamental consitutional analysis from which probable cause must be derived:

> "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.
>
> "The substance of all the definitions of probable cause 'is a reasonable ground for belief of guilt.' And this 'means less than evidence which would justify condemnation' or conviction

> ...Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge, and of which they had reasonable trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that: an offense has been or is being committed,' Carroll v. United States, 267 U.S. 132, 162, 69 L.Ed. 543, 555, 45 S.Ct. 280, 39 ALR 790.
>
> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway from enforcing the law in the community's protection. Because many situations which confront officers in course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement."
>
> 388 U.S. at 176-178.

Finally, in Jackson v. United States, 302 F.2d 194 (D.C. Cir. 1962), the future Chief Justice of the United States Supreme Court, Burger, observed that probable cause must be weighed from the viewpoint of the

training and experience of the officer at the scene of the arrest, to wit:

> "We have indicated on many occasions that there are few absolutes in the area of the law dealing with what constitutes probable cause for arrest. We have also emphasized from time to time that probable cause is not to be evaluated from a remote vantage point of a library, but rather from the viewpoint of a prudent and cautious police officer on the scene at the time of arrest. The question to be answered is whether such an officer in the particular circumstances, conditioned by his observations and information, and guided by the whole of his police experience, reasonable could have believed that a crime had been committed by the person to be arrested."

Contrary to the Defendant's assertion, the State does not abandon the foregoing analysis as applicable in the present circumstance. It is therefore plainly evident that the Defendant's and the Florida Third District Court of Appeal's hypothesis of possible innocent explanations for bits and pieces of the transaction herein is not proper constitutional analysis. Indeed, in Michigan v. DeFillippo, 443 U.S.

31, at 36 (1979), the court explained the error which is also manifest herein, thus:

> "It is not disputed that the Constitution permits an officer to arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense. Adams v. Williams, 407 U.S. 143, 148-149, 92 S.Ct. 1921, 1924-1925, 32 L.Ed.2d 612 (1972); Beck v. Ohio, 379 U.S. 89, 91, 85 S. Ct. 223, 225, 13 L.Ed.2d 142 (1964). The validity of the arrest does not depend on whether the suspect actually committed a crime; the mere fact that the suspect is later acquitted of the offense for which he is arrested is irrelevant to the validity of the arrest. We have made clear that the kinds and degree of proof and the procedural requirements necessary for a conviction are not prerequisites to a valid arrest. See Gerstein v. Pugh, 420 U.S. 103, 119-123, 95 S.Ct. 854, 865-867, 43 L.Ed.2d 54 (1975); Brinegar v. United States, 338 U.S. 160, 174-176, 69 S.Ct. 1302, 1310-1311, 93 L.Ed. 1879 (1949)." [Emphasis added].

See also Baker v. McCollan, 443 U.S. 137, at 145 (1979). Under DeFillipo, Brinegar and the foregoing authority the Defendant's position should be rejected.

II

CONCLUSION

The State submits that the prohibitions of the Fourth Amendment find no application

in the case at bar. Considering the nature of the present crime and the general absence of traditional felony indicia of criminality, the articulated facts in this case established for these highly trained and experienced officers, the reasonable probability that the Defendant was in fact transporting narcotics. These officers had an affirmative duty to act where in their specialized experience they believed a felony was taking place. See, United States v. Jodoin, 672 F.2d 232 (1st Cir. 1982) (alias and observed facts provide probable cause); see also, United States v. Rosselli, 506 F.2d 627 (7th Cir. 1974). The present ruling only serves to frustrate the effective administration of criminal justice, where through the imposition of a hypertechnical and unrealistic standard of review, the officers after extensive and conscientious police work correctly conclude that the Defendant is transporting

illicit narcotics, only to be later told that they should not have concluded that he was, even though the Defendant was transporting illicit narcotics!! Such a ruling serves only to strain the Constitution through a filament of unrealistic exatitude. To the contrary, there is no war between war between the constitution and common sense. See, State v. Nittolo, 317 So.2d 748 (Fla. 1975); see also, Royer v. State, 389 So.2d at 1020-1026 (Hubbart, J., concurring). The present ruling should therefore be reversed.

RESPECTFULLY SUBMITTED on this 5th day of October, 1982, at Tallahassee, Leon County Florida.

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No. 80-2146

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE STATE OF FLORIDA,

Petitioner,

vs.

MARK ROYER,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE STATE OF ARIZONA, AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.

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IN THE

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BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE STATE OF ARIZONA, AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by the Attorney General of the State of Florida, counsel for the Petitioner, and by Theodore Klein, Esq., counsel for the Respondent. A letter of consent of both parties has been filed with the Clerk of this Court. State governments are not required to obtain consent to file as *amici curiae.*

INTEREST OF AMICI CURIAE

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws the purposes of the AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.

2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.

3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and police effectiveness to deal with crime.

The State of Arizona is represented by its Attorney General, an elected and constitutional official who is the chief legal officer of his State and charged with the responsibility of protecting the legal rights and interests of the citizens of his State.

Our particular interest in this case arises from the fundamental and far-reaching policy issue involved—the articulation and protection of the legitimate interests of law enforcement agencies in the investigation and prosecution not only of drug traffickers, but of those who pose a threat to the safety of air travelers and also criminal suspects in general who can be identified and apprehended by use of suspect profiles and composite sketches. It is our belief that a failure of the Court to reverse the ruling of the District Court of Appeal of Florida, Third District, *en banc*, 389 So. 2d 1007 (Fla. App. 1979), and the ruling of the Supreme Court of Florida denying the State's application for review, will threaten the use of legitimate and necessary law enforcement techniques extending beyond the facts of this case.

ARGUMENT

I.

THE RULING BELOW IS IN ERROR AS IT MAY AFFECT THE USE OF DRUG COURIER PROFILES TO ESTABLISH REASONABLE SUSPICION OR PROBABLE CAUSE, AND IT SERIOUSLY THREATENS THE USE OF PROFILES IN THE HIJACKER DETECTION SYSTEM SO VITAL TO PUBLIC PROTECTION.

This case directly involves four issues that are of grave importance to state and federal law enforcement officers: (1) whether the mere approach of a police officer constitutes a detention-stop; (2) whether the facts in this case constituted a stop and arrest; (3) whether all profile transactions are illegal no matter what the facts are, under *United States* v. *Mendenhall,* 446 U. S. 544 (1980) and *Reid* v. *Georgia,* 448 U. S. 151 (1980); and (4) whether the consent and search in this case were invalid.

We will limit our consideration in this brief to certain issues and related questions that can reasonably be expected as progeny of the rulings of the District Court of Appeal of Florida, Third District, *en banc,* and the Supreme Court of Florida, if upheld by this Court.

As is our custom when appearing as *amici curiae* before this Court, we will not reiterate at any length the legal arguments made by the State of Florida in this case, although we are in complete accord with such arguments and wish to associate ourselves with and express our complete support for them. We will, however, as already stated, address only the important policy issue raised in this case, and its impact upon the effectiveness of law enforcement nationwide.

The question of reasonable suspicion based upon articulable facts under the common law stop and frisk authority of *Terry* v. *Ohio*, 392 U. S. 1 (1968), is one of exceptional importance to the state and federal governments in view of the large quantities of narcotics flowing into airports such as Miami from other cities in the Western Hemisphere, most of which is bound for destinations in the United States, such as New York City, Detroit, and Chicago. The situation in Miami is repeated at many airports around the country, as indicated by cases such as *United States* v. *Ballard*, 573 F. 2d 913 (5th Cir. 1978), *United States* v. *Elmore*, 595 F. 2d 1036 (5th Cir. 1979), and *United States* v. *Mendenhall*, 596 F. 2d 706 (6th Cir. 1979), *rev.*, 446 U. S. 544 (1980), which involved the use of drug courier profiles by federal narcotics agents. *Reid* v. *Georgia*, *supra*, indicates that the technique and its legal implications are of importance to state law enforcement personnel as well.

The basic characteristics and operation of the drug courier profile are described in varying degrees of detail in *Mendenhall* (U. S. Supreme Court and Sixth Circuit Court of Appeals opinions) and *Reid*, and will not be further described here except to note that the typical characteristics of suspects in such profiles are complex and multitudinous, sometimes involving "primary characteristics" and "secondary characteristics" as described in footnote 3 to the opinion in *Elmore*, *supra* (595 F. 2d 1036, 1039). As can readily be seen, deliberate application of such complex class characteristics requires the skill and concentration of a trained law enforcement officer, and by no means can it be said that such an officer, if properly applying the profile to a given suspect, is acting on a mere "hunch" or "guess". Indeed, such proper application must be conceded to involve the kind of "articulable suspicion" approved as the basis for the exercise of the Fourth Amendment stop and frisk power of law enforcement officers articulated first in *Terry* v. *Ohio*, *supra*.

It is important to note that construction of the profile is based not upon someone's imagination of what drug couriers must look like and their characteristics, but upon what drug couriers *in fact* look like and their *actual* characteristics, as revealed by the real-life experience of trained law enforcement officers, accumulated over a period of time and memorialized in the drug courier profile. See, *Mendenhall* (U. S. Supreme Court and Sixth Circuit Court of Appeals opinions), *Reid, Ballard* and *Elmore, supra.*

The use of the drug courier profile is analogous to two other important law enforcement activities that *amici* wish to bring to the attention of the Court, as was done in the AELE brief in *United States* v. *Mendenhall,* 446 U. S. 544 (1980). The first is the profile that has become a standard part of the total antihijacking procedures implemented by industry and the federal Government to stem the tide of aircraft hijacking and pirating that has resulted in great loss of lives and destruction of property. See, 37 Fed. Reg. 2500, *et seq.* These procedures involve, in progression: (1) a "profile" that consists of observable characteristics which, based upon the experience of law enforcement officers, distinguishes potential hijackers from the public in general—not unlike the nature and use of the drug courier profile involved in the instant case; (2) electronic weapons detectors (magnetometers); (3) interviews by airline employees or law enforcement officers, similar to the interviews conducted by law enforcement personnel after the drug courier profile has triggered an investigatory stop; or (4) frisks or searches of passengers and/or baggage. See, LaFave, 3 Search and Seizure 332 (1978); 14 ALR Fed. 286, Anti-Hijack Measures—Validity.

In the cases that have examined the constitutionality of such procedures, beginning with the use of the profile and a progression to the magnetometer, interview, and weapons frisk, the courts have upheld such techniques generally upon the basis of the Fourth Amendment stop and frisk powers articulated in

Terry v. *Ohio, supra.* See, *e.g., United States* v. *Lopez,* 328 F. Supp. 1077 (N. Y. 1971); *United States* v. *Ruiz-Estrella,* 481 F. 2d 723 (2nd Cir. 1973); *United States* v. *Epperson,* 454 F. 2d 769 (4th Cir. 1972); and also, *United States* v. *Davis,* 482 F. 2d 893 (9th Cir. 1973) (validating such procedures upon authority upholding administrative searches pursuant to a regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation). In these cases the courts have focused upon the governmental interest justifying the intrusion, concluding that the extreme danger of a hijack or destruction of property constitutes an "exigent" circumstance justifying an exception to the general warrant requirement.

The second analogous law enforcement activity is the use of composite drawings or sketches to identify and apprehend an unknown suspect in the commission of a crime. The majority of the cases that have discussed such composite drawings have involved the issue of admissibility of the drawings at trial. Such evidence has usually been excluded as hearsay. See, cases collected at 42 ALR 3d 1217, Admissibility—Composite Police Sketch. However, even though such evidence has generally been ruled inadmissible at trial, it has been recognized as having validity in the formation of *reasonable suspicion or probable cause* for Fourth Amendment arrest purposes. See, *People* v. *Griffin,* 272 N. E. 2d 477 (N. Y. 1971); *State* v. *Ginardi,* 268 A. 2d 534 (N. J. App. 1970) (where a composite was compiled by a standard police device known as an "Identi-Kit" consisting of hundreds of transparent celluloid overlays representing variations of human physiognomy); and *Commonwealth* v. *McKenna,* 244 N. E. 2d 560 (Mass. 1969). Thus, although the courts are split on the issue of the admissibility of such evidence at trial, usually excluding it on the basis of the hearsay rule, it has been recognized as valid and reliable for Fourth Amendment purposes.

Amici submit that both of the foregoing accepted and perfectly proper law enforcement investigative techniques—so absolutely necessary—are threatened by the ruling of the District Court of Appeal of Florida, Third District, *en banc*, and the Supreme Court of Florida, with respect to the use of the drug courier profile for investigatory stops founded on reasonable suspicion or even probable cause to arrest.

Can it be realistically said, that the confluence of a large number of drug courier profile characteristics, based upon the experience of trained officers in numerous *actual cases* resulting in convictions, and coming together in one suspect at the same time and place, is "consistent with innocent behavior", such that a *per se* rule is justified for excluding the profile as the basis for reasonable suspicion or probable cause?

It is submitted that the presence of a substantial number of the profile characteristics in one suspect, such as the use of small denomination bills for ticket purchases, travel to and from major drug import centers, staying for short periods of time, the absence of luggage or use of empty suitcases, nervousness, use of an alias, etc., taken together, would lead any reasonable person having special knowledge of the *modus operandi* and characteristics of interstate drug couriers to believe that such a person is a drug courier and *requires* a prudent law enforcement officer to stop and inquire of such person. As the Court in *United States* v. *Carrizoza-Gaxiola*, 523 F. 2d 239, 241 (9th Cir. 1975) stated, "[f]ounded suspicion requires some reasonable ground for singling out the person stopped as one who was involved or is about to be involved in criminal activity." Reasonable men would agree that even though any one, or a few, of these facts and characteristics taken together might be consistent with innocent behavior, the combination of several simply would not be consistent with innocent behavior.

Certainly the courts that have considered the use of the hijacker profile in finding a sufficient Fourth Amendment basis to stop and inquire, would not have agreed with the rationale of the District Court of Appeal of Florida, *en banc*, and the Supreme Court of Florida, in refusing to assign a common-sense value to the use of profiles in the reasonable suspicion-probable cause equation. Although in such cases the profile was considered *in combination* with another element of an investigatory nature, namely the activation of a magnetometer, before an inquiry was made, the profile is an essential element in itself of reasonable suspicion sufficient to undertake the sort of limited intrusion into a suspect's privacy sanctioned by *Terry* and its multitudinous progeny. Failure to accord approved legal status to the use of properly constructed and properly administered suspect profiles in drug courier cases will jeopardize the use of similar profiles in hijacker cases and will seriously disrupt the nation's air safety program.

II.

THE RULING BELOW ALSO THREATENS THE USE OF COMPOSITE SKETCHES TO ESTABLISH REASONABLE SUSPICION OR PROBABLE CAUSE.

As noted *supra*, and in the AELE brief in *United States* v. *Mendenhall*, 446 U. S. 544 (1980), many courts have recognized the value of composite sketches in the investigation of crime and the apprehension of suspects, regardless of the inadmissibility of such materials at trial under the hearsay rule. One respected commentator noted the effectiveness and utility of such sketches thusly:

> The policeman, by means of skillful questioning, and by trial and error, is able to produce a detailed drawing which the witness states is an accurate representation of the face of the perpetrator of the crime. This drawing is then reproduced in large numbers and given to police officers so as to enable them to recognize the suspect, should they

> happen to see him. Sometimes, where the crime is a very serious one, copies of the drawing are given to the newspapers, which publish them in an effort to alert the public. Often, criminals who might otherwise have gone free are recognized and arrested because of these drawings. Wall, Eye Witness Identification in Criminal Cases 169-170 (1965).

One of the most commonly used systems of composite sketches is the so-called "Identi-Kit". It consists of hundreds of celluloid overlays conforming to typical human features such as hairline, nose, eyes, chin contour, mouth, etc. A composite is usually put together by a trained law enforcement officer and it is then frequently circulated to law enforcement personnel in the field who will attempt to compare the composite sketch to persons they observe. If a specific comparison is made, and a trained law enforcement officer reasonably believes that a person matches the composite, reasonable suspicion to stop and inquire, or even probable cause to arrest, may exist.

In *State* v. *Ginardi*, 268 A. 2d 534 (N. J. App. 1970) an "Identi-Kit" was used to prepare a composite sketch of a suspect and the defendant's arrest was made on the basis of a "striking likeliness" of the defendant to the drawing, without any other suspicious circumstances being present. The Court stated:

> It is clear from the record that the Hamilton police had probable cause to believe that defendant was the man who had attacked Elaine and Susan and were justified in arresting and detaining him. 273 A. 2d 534, 541-542.

Amici respectfully submit that a legitimate law enforcement investigatory tool is threatened by the ruling of the Florida courts in this case. The similarities between the use of profiles and composite sketches—the attempt to isolate and identify suspects by the use of common characteristics—require a holding by this Court, one that will clarify the issues raised

and decided in *Mendenhall* and *Reid*, that profiles and composite sketches may be the basis for reasonable suspicion and probable cause.

Indeed, many police departments have carried the use of composite sketches produced by the "Identi-Kit" method one step further by coupling the Kit with *modus operandi* files in a system called "IDMO" to produce mug shots of potential suspects. See 20 Am Jur Proof of Facts 539, Eye-Witness Identification, Section 13. All such legitimate investigatory techniques are threatened by the holding of the courts below. Law enforcement agencies, state and federal, will not be able to identify and apprehend suspects in thousands of cases where investigatory stops founded on reasonable suspicion, and arrests founded on probable cause are presently recognized by the courts.

CONCLUSION

The decisions of the District Court of Appeal of Florida, Third District, *en banc,* and of the Supreme Court of Florida, should be reversed as they pertain to the issue of the use of the drug courier profile as a basis for reasonable suspicion and probable cause, because they are unwarranted under the facts of this case and any reasonable application of Fourth Amendment principles, as well as on the basis of sound public policy.

Respectfully submitted,

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No. 80-2146

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF FLORIDA, PETITIONER

v.

MARK ROYER

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether respondent had been effectively arrested when he accompanied county narcotics officers from an airline terminal concourse to a nearby office where he agreed to a search of his luggage.

2. Whether respondent was illegally seized when the officers first approached him and asked to speak to him, or during the course of the brief interview which followed.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case presents questions concerning the legality of procedures utilized by local police officers in an airport surveillance program designed to intercept couriers transporting narcotics through Miami International Airport. That surveillance program is similar to the nationwide airport surveillance program operated by the federal Drug Enforcement Administration (DEA) in order to intercept domestic couriers transporting narcotics between major drug source and distribution centers in the United States. See *United States* v. *Mendenhall*, 446 U.S. 544, 562 (1980) (opinion of Powell, J.). The DEA program is now in operation at more than 20 airports throughout the nation, and is an important and highly successful part of DEA's total drug enforcement effort.

Under the DEA program, trained agents scrutinize arriving and departing passengers on certain flights, looking for characteristics and behavioral traits that, in their collective experience, tend to distinguish drug couriers from ordinary passengers. The DEA and its agents in the field have also developed relatively standard procedures for approaching and questioning individuals suspected of being drug couriers. These procedures generally involve a pattern of investigation similar to that in the present case. Accordingly, the outcome of this

case will have a significant impact upon the viability of DEA's important airport surveillance program and the federal program for enforcement of laws against drug trafficking.[1]

STATEMENT

1. The evidence adduced at the suppression hearing in this case showed that at approximately 12:30 p.m. on January 3, 1978, Dade County plainclothes police officers Johnson and Magdalena were working on narcotics detail at Miami International Airport. Officer Johnson noticed respondent as he waited in line at the ticket counter of National Airlines. The officers observed respondent over a period of 15 to 20 minutes (Tr. 6-7, 9, 11-13, 18).[2] Respondent was pale and appeared to be extremely nervous (Tr. 14-15, 18-19). He kept a close watch on two large and seemingly heavy American Tourister suitcases that he had set down underneath a rope in front of the ticket counter, and continually glanced around as if looking to see whether anyone was paying particular attention to him (*ibid.*). After respondent paid for his ticket in cash from a large roll of bills, he was given two adhesive labels to attach to his suitcases (Tr. 18-21). Respondent wrote the words "Holt" and "La Guardia" on the labels, but did not fill in either an address or phone number in the spaces provided (Tr. 21-22). After checking his two suitcases, respondent

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[1] DEA has devoted considerable effort to training its agents to assure compliance with the evolving outlines of the Fourth Amendment law that governs airport drug surveillance. In this training, the DEA presently employs a comprehensive manual, *Legal Problems in Airport Interceptions of Domestic Drug Couriers* (1980) ("DEA Manual"), that instructs agents on the requirements of the Fourth Amendment. We have lodged copies of this publication with the Clerk for distribution to the Court and provided copies to counsel. Earlier versions of this manual have been in use in DEA training since 1978. *Id.* at 8. Pursuant to 21 U.S.C. 873, the DEA provides training employing these materials to state and local law enforcement personnel as well as federal agents.

[2] "Tr." refers to the transcript of the May 22, 1978, suppression hearing.

proceeded to the concourse leading to the boarding area (Tr. 22-23).

Based on the foregoing observations, which had aroused their suspicions, the two officers approached respondent, identified themselves as police officers, and asked him if he had a moment to talk to them (Tr. 23-24; 38-39). When respondent replied that he did, Officer Johnson asked to see his airline ticket. Respondent produced a one-way ticket to New York in the name "Holt" (Tr. 24). Johnson then asked to see some identification, and respondent produced a New Jersey driver's license bearing the name "Mark Royer" (Tr. 24-25). When asked to explain the discrepancy, respondent stated that a friend had made the reservation for him in the name of "Holt" (Tr. 25). By this time respondent was extremely nervous; his face was pale, his hands were shaking, and he was visibly sweating (*ibid.*).

The officers informed respondent that they were narcotics investigators and that they had reason to suspect he was transporting narcotics (Tr. 26). They asked him to accompany them to a room approximately 40 feet away in order to get out of the general population of the airport (Tr. 26-27).[3] Respondent followed without protest. The officers led respondent to an airline stewardesses' lounge, where a large storage closet along one wall had been converted into a small office used by the police, outfitted with a desk and two chairs (Tr. 27).

Inside the office, one of the officers requested respondent's consent to a search of his suitcase, explaining that he was suspected of carrying narcotics and that a search would either dispel or confirm that suspicion (Tr. 28).[4]

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[3] At the suppression hearing, Officer Johnson explained that the move was made "[f]or the protection of the general public" and to minimize embarrassment to respondent (Tr. 32).

[4] The opinion under review states (Pet. Supp. App. 45) that the officers retrieved the luggage and brought it to the office before requesting respondent's consent to search. However, the record is not entirely clear on this point and could be read to suggest that the sequence was the reverse. See Tr. 28-29, 44-45, 48-49. The trial court made no finding on this point.

Respondent produced a key from his pants' pocket and unlocked one of the suitcases, which Officer Johnson then opened (Tr. 29). As for the second suitcase, which appeared brand new, respondent claimed not to know the combination (Tr. 29, 45). Officer Johnson asked him if he had any objection to their opening that suitcase, and respondent replied, "No, go ahead" (Tr. 29). When Johnson explained that he might have to break the suitcase, respondent stated he had no objection (*ibid.*). Officer Johnson then opened the suitcase with a screwdriver (Tr. 30). Respondent's luggage contained what was later determined to be 65 pounds of marijuana (Tr. 29-30). Respondent was placed under arrest and given *Miranda* warnings (Tr. 33).

Respondent was the only witness besides Officer Johnson to testify at the suppression hearing. Respondent claimed that he had agreed to talk to the officers, had shown them his airline ticket and driver's license, and had accompanied them to their airport office because he felt he had no choice (Tr. 52-54). He explained his cooperation, stating "[T]hey were police officers and I felt that's what I had to do" (Tr. 52).[5] Respondent further testified that when he entered the office the officers asked him to empty his pockets and later "told" him to open up the suitcase with the key he had removed from his pockets.[6] In each instance he complied. He explained that he made no attempt to leave because he "didn't think that was a possibility" (Tr. 57).

2. Respondent argued that he had been placed under arrest because he reasonably believed his liberty constrained, that there was no probable cause to support an arrest, and that his consent to the search was accordingly ineffective (Tr. 66-70). The State argued that the original contact was not even a stop requiring reasonable suspicion (Tr. 71-72), and in the alternative that the

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[5] Officer Johnson had testified that the entire encounter with respondent proceeded in conversational tones and that no physical force or threat was employed (Tr. 32-35).

[6] Officer Johnson testified, however, that respondent was asked to empty his pockets after he was arrested (Tr. 49).

officers had a founded suspicion that respondent was engaged in criminal activity sufficient to support a minimally intrusive investigative detention of limited duration under *Terry* v. *Ohio*, 392 U.S. 1 (1968) (Tr. 72-74).

The trial court denied the motion to suppress from the bench, finding the search conducted to have been reasonable (Tr. 78-79). The court stated (*ibid.*):

> [T]he Court believes that the consent was freely and voluntarily given. By the same token, I think under circumstances such as this where the police officers are in the airport and are surveilling, as testified to by the officer, with a specific profile that they are following, that the officer doesn't have the time to run out and get a search warrant because the plane is going to take off. If there is going to be anything occurring it's going to occur long before they can take any type of action. So it's a denial on dual grounds. Might as well get it tested whether it's reasonable or unreasonable because, I assume you are taking an appeal.[7]

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[7] The trial court did not explicitly address respondent's contention that he had been effectively arrested, or the State's contention that no seizure had transpired or that the encounter was a permissible *Terry* stop. The panel of the appellate court described the trial court's alternative holding as follows: (Pet. Supp. App. 2; footnote omitted):

> [W]ith the defendant fitting the profile of a drug courier and [*sic*] officers had probable cause to believe his luggage contained contraband, justifying a search.

The actual ruling, quoted in the text, does not demand this characterization. Presumably the panel inferred from the lower court's discussion of exigent circumstances that that court had found, *sub silentio*, probable cause supporting a search, and had further found (explicitly) that exigent circumstances excused the absence of a search warrant. But given the State's reliance upon *Terry* v. *Ohio*, it seems more likely that the trial court's true intention was to explain, by tracking loosely this Court's analysis in *Terry*, why neither a warrant nor probable cause is required to limited investigative detention. Thus, it may be that the trial court meant to hold, in conformity with the State's argument, that there was no more than a *Terry* stop here, that it was properly supported by founded and articulable suspicion, and that respondent's consent to the search was accordingly untainted, even if the preceding interview was not entirely consensual.

3. A panel of the District Court of Appeal of Florida, Third District, with one judge dissenting, affirmed (Pet. Supp. App. 1-35). On rehearing, the en banc court reversed the denial of the suppression motion (*id.* at 36-74) and directed dismissal of the charges against respondent (*id.* at 56).

The en banc court held (Pet. Supp. App. 47-50) that respondent had been arrested at the time he consented to the search of his suitcases because he "was 'under [the] reasonable impression that he [was] not free to leave * * *'" (*id.* at 49; citations omitted). In support of the arrest characterization, the court noted that respondent was placed in confined quarters with two policemen, that he had been told of the officers' suspicions, that his plane ticket and luggage had been taken from him,[8] and that the State had conceded at oral argument that respondent would not have been allowed to leave the police office had he attempted to do so (*id.* at 47-48).

The en banc court held the arrest unlawful for lack of probable cause (Pet. Supp. App. 50-53).[9] Respondent's

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[8] The officers had retained respondent's airline ticket as they walked with him from the concourse, where he had produced the ticket in response to the officers' request, to the makeshift office. Before retrieving respondent's luggage, Officer Johnson removed the baggage stubs from respondent's ticket folder, leaving the ticket behind with respondent and Officer Magdalena in the office. (Tr. 41-42, 44, 46).

[9] Because it held that respondent had been arrested, the en banc court declined to decide whether the facts available to the officers, including the discrepancy with respect to respondent's name, would constitute reasonable suspicion sufficient to support a *Terry* stop (Pet. Supp. App. 42-43 n.6, 51-52 & n.11). The court did, however, record its view (*id.* at 51) that "a mere similarity with the contents of the drug courier profile is insufficient even to constitute the articulable suspicion required to justify a *Terry* stop," citing *Reid* v. *Georgia*, 448 U.S. 438 (1980). Notwithstanding its reservation of decision, the court also noted (Pet. Supp. App. 39-41) its view that all of the bases for suspicion cited by the officers to explain the initial contact "are at least equally, and usually far more frequently, consistent with complete innocence" (*id.* at 39a). The court rejected out of hand (*id.* at 40 n.4) Officer Johnson's testimony (Tr. 16-17) that based upon his experience he was generally able to

consent to the search was held to be an unattenuated fruit of the unlawful arrest and therefore to have been involuntary and invalid (*id.* at 53-55). Finally, turning to the trial court's alternate holding, the en banc court declined to decide "whether 'exigent circumstances' are involved in departing airline passenger cases like this one," noting that such circumstances could excuse only the absence of a warrant and not the absence of probable cause to support a search (*id.* at 55-56).[10]

SUMMARY OF ARGUMENT

I

The issue actually decided by the court below is whether respondent was effectively under arrest at the time he consented to the search of his luggage. The decision that he was rests upon the mistaken application to that issue of the test for distinguishing seizures subject to the Fourth Amendment from consensual police-citizen contacts that do not implicate the Fourth Amendment at all. The test used, which turns on whether a reasonable person in respondent's place would have thought himself free to leave, plainly cannot be applied to distinguish investigative detentions from arrests, for both are seizures having that characteristic. Yet an investigative detention is a less intrusive encounter justifiable on the basis of reasonable suspicion falling short of the traditional probable cause standard for arrest.

An investigative detention is distinguishable from an arrest requiring probable cause by reference to the

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distinguish the furtive wariness of a drug courier from the flight anxiety of a "white knuckle airline passenger."

In light of its conclusion that respondent had been unlawfully arrested, the en banc court also reserved decision as to whether he had been "seized" for Fourth Amendment purposes as soon as the officers approached him and asked to speak to him (Pet. Supp. App. 49 n.8).

[10] The en banc court evidently read the trial court's oral opinion as holding that the exigency created by an air traveler's imminent departure was in itself a sufficient predicate for a search, without regard to the existence of probable cause (see Pet. Supp. App. 46-47, 55-56; compare page 5 note 7, *supra*).

limited duration and purpose of the detention. Here, the involuntary detention of respondent, if any there was, was limited to a period of not more than 15 minutes (Tr. 31) and was rigidly circumscribed by the officers' objective to seek respondent's consent to search respondent's luggage. Whether or not consent would be secured, and the results of any search that might be authorized, were matters that would assuredly become known within a short period of time. Thus, respondent's detention falls well within the bounds of a permissible investigative detention, and, unlike the situation in *Dunaway* v. *New York*, 442 U.S. 200 (1979), was entirely different in character from an arrest. None of the factors cited by the court below in support of the arrest characterization justify a contrary conclusion.

II

If this Court finds error in the holding that respondent had been arrested, it may simply remand for consideration of the remaining issues, which were not decided by the court below. The Court may, however, deem it appropriate instead to decide, or afford guidance respecting, the questions whether respondent was unlawfully seized when he was first approached by the police or at some time thereafter.

A. It is our submission, consistent with the views expressed by Justices Stewart and Rehnquist in *United States* v. *Mendenhall*, 446 U.S. 544, 551-557 (1980), that respondent was not seized when he was approached by police and asked for his ticket and identification. Whatever may have been the social or psychological wellsprings of respondent's decision to cooperate with the officers' inquiry, the question whether there was a Fourth Amendment seizure turns not upon those factors but upon the objective behavior of the officers. There is no evidence here of any conduct by the officers that created an objective basis for believing that respondent was not free to terminate the encounter at will.

Alternatively, if the Court concludes that this contact amounted to a seizure, we submit that in light of the

important governmental interest in interdicting interstate commerce in dangerous drugs and the very nominal intrusion involved, the facts known to the officers at the time they approached respondent were sufficient to justify their action.

B. Assuming that respondent was not unlawfully seized in the initial phase of the encounter, there can be no question that strong reasonable suspicion amply justifying an investigative detention quickly developed, for the initial interview alerted police to the fact that respondent was traveling under a false name and that he had lied to them in explaining this conduct. These circumstances plainly sufficed to establish reasonable grounds for the officers' ensuing effort to secure respondent's consent to a search of his luggage.[11]

ARGUMENT

I. RESPONDENT HAD NOT BEEN ARRESTED AT THE TIME HE CONSENTED TO THE SEARCH OF HIS SUITCASES

Because it concluded that respondent's consent was tainted by an unlawful arrest, the court below failed to consider whether or not respondent's consent to the search of his suitcases had correctly been found to be voluntary by the trial court. The en banc appellate court's decision, however, rests upon application of an erroneous standard for determining whether an arrest has occurred.

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[11] Because of the limitations of space applicable to an amicus curiae, and the number of issues presented by this case, we invite the Court's attention to our brief in *Michigan* v. *Summers*, No. 79-1794 (June 22, 1981), pages 9-22, and our brief in *United States* v. *Mendenhall*, *supra*, pages 47-62, wherein we address the distinction between an arrest requiring probable cause and a lesser seizure sustainable on the basis of reasonable suspicion more fully than is possible here. We similarly invite the court's attention to pages 19-26 of our brief in *Mendenhall* addressing the question whether the initial contact with the respondent there was a seizure *vel non*, and pages 26-42, which address the existence of reasonable suspicion at the beginning of that encounter. Copies of these briefs have been provided to counsel.

The test employed was whether respondent "was 'under [the] reasonable impression that he [was] not free to leave the officer's presence'" (Pet. Supp. App. 49; citations omitted). However, this standard governs only the preliminary question whether respondent had been seized at all for Fourth Amendment purposes and does not serve to distinguish an arrest from a less intrusive seizure that need not rest on probable cause. Application of a proper standard looking to the character and purpose of the detention shows that it was not of such a nature as to require probable cause.

1. In a series of decisions commencing with *Terry* v. *Ohio*, 392 U.S. 1 (1968), and including most recently *Michigan* v. *Summers*, No. 79-1794 (June 22, 1981), this Court has affirmed that particular kinds of police conduct of an investigative nature may constitute a "seizure" subject to the constraints of the Fourth Amendment and yet be permissible under the general reasonableness standard dictated by that provision, even in the absence of probable cause. See also *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 882-884 (1975); *Adams* v. *Williams*, 407 U.S. 143 (1972). At the same time, the Court has recognized that

> [N]ot all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.

Terry v. *Ohio*, *supra*, 392 U.S. at 19 n.16. The test that has generally been applied to distinguish consensual encounters from seizures subject to the Fourth Amendment is whether "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.); *United States* v. *West*, 651 F.2d 71, 72 (1st Cir. 1981), petition for cert. pending No. 81-307 (filed Aug. 14, 1981); *United States* v. *Patino*, 649 F.2d 724, 726-727 (9th

Cir. 1981); *United States* v. *Elmore*, 595 F.2d 1036, 1041-1042 (5th Cir. 1979), cert. denied, 447 U.S. 910 (1980); *United States* v. *Wylie*, 569 F.2d 62, 68 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978); *State* v. *Reid*, 276 S.E. 2d 617, 621 (Ga.), cert. denied, No. 81-1807 (Oct. 5 1981), on remand from 448 U.S. 438 (1980); see also *United States* v. *Harrison*, No. 81-5042 (4th Cir. Jan. 7, 1982), slip op. 5-6. *United States* v. *Price*, 599 F.2d 494, 498 (2d Cir. 1979). This is essentially the test invoked by the court below to distinguish an arrest from a more limited seizure. By misapplying this test, the court below effectively rejected this Court's repeated holding that not all seizures require a showing of probable cause.

Plainly, probable cause is not required to justify a police-citizen encounter whenever a reasonable person in the citizen's position would think himself not free to leave, for if there exists no objective basis for believing that there has been a forcible detention, there would be no seizure subject to the Fourth Amendment at all. Rather, an arrest requiring probable cause is to be distinguished from an investigative detention by reference to the purpose and duration of the detention as well as the procedures which accompany the detention. In *Michigan* v. *Summers*, *supra*, slip op. 8, the Court recognized the "general rule that every arrest, and every seizure having the essential attributes of a formal arrest, is unreasonable unless it is supported by probable cause." Yet the Court upheld the detention of an individual—who was indisputably not free to leave—during the lawful search of his home, stating (*ibid.*):

> [T]he exception for limited intrusions that may be justified by special law enforcement interests is not confined to the momentary, on-the-street detention accompanied by a frisk for weapons involved in *Terry* [v. *Ohio*, 392 U.S. 1 (1968)] and *Adams* [v. *Williams*, 407 U.S. 143 (1972)].

The Court explained (slip op. 8, n.12):

> If the purpose underlying a *Terry* stop—investigating possible criminal activity—is to be served, the police must under certain circumstances be able to

> detain the individual for longer than the brief time period involved in *Terry* and *Adams*.

And the Court distinguished between searches and seizures requiring a probable cause predicate and other lesser intrusions by reference to "the character of the official intrusion and its justification." Slip op. 9.

The Court also quoted with approval Professor La Fave's recitation of examples of investigative techniques that may justifiably be carried out under the rubric of an investigative detention based upon founded suspicion. *Ibid.*, quoting 3 W. La Fave, *Search and Seizure* § 9.2, at 36-37 (1978). Professor La Fave's summary of the governing principle concludes that the permissibility of extending a *Terry* stop should turn on "[w]hether the police are diligently pursuing a means of investigation which is likely to resolve the matter one way or another very soon and whether it is rather essential to the investigation that the suspect's presence be continued during that interval." *Id.* at 40.

The criteria for a valid investigative detention are fully satisfied on the present record. Once Officers Johnson and Magdalena had observed that respondent was traveling under a false name and recognized that respondent had lied in explaining the discrepancy in names,[12] they reasonably decided to seek respondent's consent to a search of his suitcases. Examination of respondent's luggage was calculated to resolve promptly the accuracy of their suspicion and to precipitate either his release or his arrest, for if respondent's luggage had not contained contraband it seems clear that he would have been free to go.[13] The entire encounter between the police and respondent from their first approach until respondent's arrest lasted no more

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[12] The identity between the name respondent placed on his luggage tags and that on the airline ticket revealed the falseness of his explanation that a friend had purchased the airline ticket for him.

[13] It does not matter that respondent might have refused consent to the search. Plainly the officers had a right to attempt to secure such consent—a procedure which took only a few moments. Of course, if respondent had refused consent and nevertheless been further detained, a different question would be presented.

than 10 to 15 minutes (Tr. 31). And precisely because respondent's consent to a search of the luggage was to be sought, his presence was obviously essential to the investigation.

2. Contrary to the District Court of Appeal's suggestion (Pet. Supp. App. 50), *Dunaway* v. *New York*, 442 U.S. 200 (1979), provides no support for the conclusion that the events that transpired here amounted to an arrest requiring probable cause. In *Dunaway*, police, acting on information (not amounting to probable cause) that implicated Dunaway in a murder, went looking for him and, after locating him at a neighbor's house, placed him in a police car and brought him to a police station without his consent. There, after being given *Miranda* warnings, Dunaway was interrogated in a custodial situation for a period of an hour, at which point he confessed to the crime. Although Dunaway had not been formally arrested and charged with a crime, the Court held that his detention without probable cause was unlawful because it was "in important respects indistinguishable from a traditional arrest." 442 U.S. at 212. In support of this characterization the Court noted the extended interrogation to which Dunaway was subjected, the involuntary transfer to the police station, and the use of an interrogation room, as well as the fact that he was not told he was free to go and in fact would not have been allowed to depart had he attempted to do so. Mr. Justice White concurred (442 U.S. at 219-220) noting that the Court's opinion should not be read to limit investigative detentions on less than probable cause to the facts of *Terry* v. *Ohio* and stressing that the similarity between the procedures used and a traditional arrest explained the result.

This case is readily distinguishable. First, the trial court in this case apparently found that, unlike Dunaway, respondent consented to the initial contact with police and to the ensuing move to the "office" in the stewardesses' lounge. In holding that the consent to search was tainted by an illegal arrest, the en banc appellate court never addressed the trial court's finding that the entire course

of conduct leading up to the search was consensual.[14] This consent undercuts any claim that the respondent had been arrested by the time he consented to the search of his luggage. *United States* v. *Mendenhall*, *supra*, 446 U.S. at 557-558. But even if the move to the office is assumed to have been non-consensual, there was nothing like an arrest here. First, the duration of the interview in this case was much briefer than that in *Dunaway*. Moreover, while the interrogation in *Dunaway* ended after an hour with Dunaway's confession, there was every indication that it would have continued indefinitely had Dunaway not incriminated himself. Nor did the interview here resemble a custodial interrogation. Indeed, the officers' purpose in walking with respondent to their airport quarters was not to secure information from him but simply, if he agreed to it, to carry out a consent search of his luggage under conditions that would spare respondent unnecessary embarrassment.

The setting here, too, was less suggestive of an arrest—a makeshift facility close to public areas of the airport with none of the provisions for security commonly associated with a police station. In sum, the shift of location from the airport concourse to the nearby lounge here carried no suggestion of arrest. Respondent could not reasonably have believed that, absent some further developments, he was going to be charged with a crime or even detained for any extended period of time. By contrast, the involuntary transfer of Dunaway in a police car from a neighbor's home to a police station had all the earmarks of an arrest.[15]

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[14] In light of the arguments made in the trial court, we interpret the court's rather conclusory finding of consent (see page 5, *supra*) to mean that the entire sequence of events up to and including the consent to search was consensual. If the Court deems the trial court's finding insufficiently clear, a remand for further proceedings may be warranted.

[15] The Court has on several occasions recognized that an individual may properly be asked to make some movement from a point at which he has encountered law enforcement officers for reasons of safety and convenience without requiring that the officers

3. Finally, we turn to the factual considerations noted below in support of the conclusion that respondent had been arrested. The court first noted the confined quarters to which respondent was removed in the company of two police officers (Pet. Supp. App. 47-48).[16] But it is readily apparent that these makeshift quarters in no respect resembled a cell or interrogation room and were devoid of any equipment other than that which might be found in any office (Tr. 27). Officer Johnson explained the absence of "police paraphernalia," noting that "it wasn't an area we could really secure very well" (*ibid.*). The most striking quality of these quarters was their lack of resemblance to a police station; plainly they were adopted purely for convenience. In short, there was nothing about this setting that served to transmute into an arrest what was otherwise at most an investigative detention.

The second factor cited by the District Court of Appeal—that the officers told respondent of their suspicions—is equally inadequate to justify the arrest label applied. This fact does nothing to distinguish the encounter from an investigative detention. Indeed, contrary to the inference drawn by the court, by identifying the nature of his suspicion Officer Johnson made it plain that it was merely a suspicion that he entertained, that no charges were being lodged in any formal sense, and that by consenting to a search the respondent might have the opportunity to dispel that suspicion, thereby terminating the investigation.[17]

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be able to adduce any greater reason for suspicion than that which occasioned the stop originally. See, *e.g.*, *Michigan* v. *Summers*, *supra*, slip op. 10 n.16, 13; *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109-111 (1977); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 560 (1976).

[16] We note that respondent was left alone with Officer Magdalena at the time Officer Johnson went to retrieve the luggage (Tr. 42).

[17] Officer Johnson recounted his statement to respondent (Tr. 28):

> To be the best of my recollection, it was something to the effect that we suspected that he was carrying narcotics, and that we would like him to open the suitcases to allow us to see what was in them to dispel that suspicion or to confirm that suspicion.

From the perspective of a person not carrying contraband, it would thus have been absolutely clear that there was no arrest here. The situation in this respect contrasts sharply with that in *Dunaway*.

Another factor singled out by the en banc appellate court—the agents' control of respondent's luggage and his ticket (Pet. Supp. App. 48) is again entirely insufficient to convert the encounter from a *Terry* stop to an arrest. First, as is noted above (page 3 note 4), it is by no means clear that the officers secured respondent's luggage before obtaining his consent. And even if they did, that would in no respect alter the fundamental character of the encounter. Certainly if, as we argue below (see page 30 note 27, *infra*), there was by this juncture reasonable suspicion justifying a brief detention of respondent for the purpose of seeking his consent to a search of the suitcase, it was *a fortiori* reasonable to secure the suitcases themselves so as to make it possible to search them if consent was forthcoming. The detention of the suitcases prior to securing respondent's consent to their search, if it indeed occurred, lasted only a matter of moments.[18] Because the officers promptly made

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[18] This case thus does not present a question comparable to that presented in *United States* v. *West*, *supra*, 651 F.2d at 74, petition for cert. pending No. 81-307 (filed Aug. 14, 1981), where narcotics agents detained a suitcase for a period of one hour pending the arrival of a narcotics detecting dog because they reasonably suspected that the suitcase contained narcotics. There the defendant had refused consent to search of his luggage and had been allowed to proceed on his way while his bags were detained. The instant case is distinguishable by the extreme brevity of any detention of luggage, the limited purpose served, and the fact that absent respondent's consent to the search no significant intrusion upon respondent's privacy or possessory interests in his luggage would have been effected. There is no reason to conclude that respondent's consent to search was a product of the retrieval of his luggage. We note that the court below did not hold that the momentary detention of respondent's luggage itself violated any Fourth Amendment right or that the consent to search was a fruit of such a violation. Rather, the court viewed the retrieval of the luggage as an indica-

it clear to respondent that the purpose of retrieving his luggage was to make it possible for them to search it if he consented, the retrieval of the luggage underscores, rather than contradicts, the limited character of the contact between police and respondent. The retrieval of the luggage accordingly did not convert the situation into an arrest.

The officers' retention of respondent's airline ticket is also no more probative of an arrest than the other factors discussed above. It may be that the officers' failure immediately to return respondent's ticket lends support to the conclusion that he was at some point seized (but see note 27, *infra*), but the ticket was never removed from respondent's presence, and the officers' custody of it in no way implied that the interview of respondent was tantamount to lodging of a criminal charge, or that his detention would not end upon completion of the brief planned course of investigation.

A final factor adduced by the court below in support of its conclusion that respondent had been arrested was the State's apparent concession at oral argument that the officers would not have allowed respondent to leave the makeshift office if he had sought to do so (Pet. Supp. App. 50). This concession is not supported by anything in the record, and it is thus simply impossible to say what the subjective intentions of Officers Johnson and Magdalena were. In any event, those subjective intentions are irrelevant, for there is no indication that any such intentions were communicated to respondent. *Scott* v. *United States*,

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tion that respondent had been arrested—a conclusion we think entirely unfounded for the reasons stated in the text.

We note that the Second Circuit's recent decision in *United States* v. *Place*, 660 F.2d 44 (1981), conflicts with the First Circuit's *West* decision with respect to the lawfulness of the detention of luggage. The Second Circuit has declined to reconsider its decision en banc, and we intend to seek this Court's review of the decision in *Place*. As explained above, however, there is no occasion to consider here whether a detention of luggage of the sort involved in *West* and *Place* is permissible based upon reasonable suspicion.

436 U.S. 128, 136-137 (1978); *United States* v. *Mendenhall*, *supra*, 446 U.S. at 554 n.6 (opinion of Stewart, J.). Moreover, the State's concession is inapposite to the inquiry at hand, for even assuming the officers planned to detain respondent, if he sought to leave, until they had ascertained whether he would consent to a search of his bags, that shows only that he would have been seized, if necessary, and not that he was seized. Furthermore, to the extent the officers' subjective intentions may be considered, they bear only upon whether there was a seizure of some kind and not on whether the seizure was an arrest.

In sum, there is nothing in the record that supports the District Court of Appeal's conclusion that respondent had been subjected to an arrest or its functional equivalent at the time he consented to the search of his suitcases. The contraband uncovered is thus not suppressible as the fruit of an unlawful arrest.

II. RESPONDENT WAS NOT UNLAWFULLY SEIZED BY THE DADE COUNTY POLICE OFFICERS

Thus far we have argued that respondent was not under arrest or subject to a functionally equivalent form of detention requiring a probable cause predicate at the time he agreed to the search of his luggage. If the Court agrees with our submission, it may simply remand the case to the Florida courts for any further proceedings. Alternatively, however, the Court may deem it appropriate to address some of the remaining issues in this case, which may be urged as alternative grounds for affirmance or arise upon remand, so as to provide guidance for the courts below. That course may be particularly appropriate because the opinion under review gives reason to believe that the court below is disposed to an erroneous view of the law that would apply on remand. We address those issues in the remaining sections of this brief.

Assuming that respondent was not arrested at any point prior to the search, the question may arise whether he was subject to any lesser intrusion regulated by the Fourth Amendment, and if so, whether the necessary

predicate for that police conduct existed.[19] It is our threshold contention that respondent was not seized within the meaning of the Fourth Amendment during the initial encounter with police. Alteratively, we contend that if a seizure technically occurred, the intrusion effected was so modest as to be reasonable in light of the grounds for suspicion known to the officers at the time they contacted respondent. Finally, we argue that the second phase of the encounter, in which respondent accompanied the officers to their makeshift office, was either a continuation of a consensual encounter, or at most a time-limited investigative detention justifiable in light of the additional grounds for suspicion established in the first phase of the interview.

At the outset, we note the significant parallels between this case and *Mendenhall*. In *Mendenhall* the Court considered an airport encounter between agents of the federal Drug Enforcement Administration and an individual suspected of transporting narcotics that was in many respects similar to that at issue here (see 446 U.S. at 547-549). The Court held that the initial approach of the agents to Mendenhall, and their request for identification and her airline ticket, did not constitute an unlawful seizure (*id.* at 557). Justices Stewart and Rehnquist concluded that the encounter did not constitute a seizure subject to the Fourth Amendment at all, explaining (*id.* at 553):

> We adhere to the view that a person is "seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained.

Justice Powell, joined by the Chief Justice and Justice Blackmun, did not reach the question whether Mendenhall had been seized because the government had not argued the contrary in the lower courts, which had accordingly assumed that a seizure occurred. *Id.* at 560. They noted,

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[19] Although respondent's counsel's argument on the motion to suppress is not entirely clear, it appears that he did argue (Tr. 68-69) that even if he was not arrested, respondent was seized unlawfully at some point.

however, that they did not necessarily disagree with Justice Stewart's analysis. See also *Reid* v. *Georgia*, 448 U.S. 438, 442-443 (1980) (Powell, J., concurring). On the merits, the concurring Justices concluded that, even assuming Mendenhall had been seized when approached by the DEA agents, the intrusion was so modest as to be reasonable in light of the grounds for suspicion known to the agents. 446 U.S. at 565. As will be evident, our argument applies, in turn, the analysis employed by Justice Stewart and that employed by Justice Powell.

A. Respondent Was Not Seized Within The Contemplation Of The Fourth Amendment When Dade County Police Officers Approached Him And Asked If He Would Show Them His Airline Ticket And Identification

The issue addressed in Justice Stewart's opinion in *Mendenhall*—the standards by which it is to be determined whether an encounter between law enforcement officers and an individual whom they may suspect of wrongdoing constitutes a "seizure" of the person rendering the encounter subject to the Fourth Amendment—is one of great practical importance. In the course of discharging his law enforcement and community caretaking responsibilities, the conscientious police officer is (and properly should be) constantly alert to events or behavior that indicate some possibility that violations of law are taking place. Usually the initial basis for suspicion will not amount to probable cause, and often it will not constitute the degree of reasonable suspicion necessary to justify any kind of forcible detention of the individual. At the same time, the only available means of investigating the suspicion will often be through inquiry of the individual, which in some significant proportion of instances will lead to the discovery of further information ultimately resulting in the apprehension of a criminal or the prevention of a crime. We find it hard to imagine that a rational set of rules would require the officer to shrug his shoulders and walk away in such circumstances,

rather than making contact with a suspect in order to pursue the inquiry.

As in *Mendenhall* and in the instant case, a salient characteristic of such investigatory encounters will often be their ambiguity: the officer will say nothing regarding the individual's freedom to walk away, and the individual will not inquire. At heart, then, the legal inquiry into whether such an encounter constitutes a Fourth Amendment seizure will often turn on the choice of a presumption in favor of or against the conclusion that an encounter, without more, constitutes a seizure. We submit that this Court has already decided this question in favor of the view that an encounter will be presumed not to be a seizure in the absence of affirmative evidence to the contrary. Thus, as the Court stated in *Terry*, "[o]nly when the officer, *by means of physical force or show of authority*, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." 392 U.S. at 19 n.16 (emphasis supplied).[20] See also *Sibron* v. *New York*, 392 U.S. 40, 63 (1968) ("show of force or authority which left [the individual] no choice"); cf. *Adams* v. *Williams*, *supra*, 407 U.S. at 146 n.1.

As Justice Stewart aptly summed up the controlling principles in *Mendenhall* (446 U.S. at 554-555; footnotes and citations omitted):

> [A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some

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[20] Justice White added, in a concurring opinion, that "[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." 392 U.S. at 34. Justice Harlan, too, noted that a policeman has the same right as any other citizen to pose questions of others, so long as the individual addressed retains his ordinary freedom to decline to satisfy his questioner. *Id.* at 32-33.

> physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. * * * In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

This test has been adopted by all of the federal courts of appeals to address this question (see pages 10-11, *supra*), and the courts have generally concluded upon facts similar to those persented here that no seizure has been effected. See, *e.g.*, *United States* v. *Wylie*, *supra*, 569 F.2d at 68 ("what a reasonable man innocent of any crime would have thought had he been in defendant's shoes"); *United States* v. *West*, *supra*; *United States* v. *Setzer*, 654 F.2d 354, 358 (5th Cir. 1981), *United States* v. *Berry*, 636 F.2d 1075 (5th Cir. 1981), rehearing en banc granted, 649 F.2d 385 (11th Cir. 1981); but see *United States* v. *Patino*, *supra*,

Here, as in *Mendenhall*, no seizure occurred when the officers approached respondent. Indeed, the pattern of the two encounters is strikingly similar—a fact we ascribe to professional police training.[21] Just as in *Mendenhall* (446 U.S. at 555):

> [T]he events took place in the public concourse. The [officers] wore no uniforms and displayed no weapons. They did not summon the respondent to their presence, but instead approached [him] and identified themselves as [police officers]. They requested but did not demand to see the respondent's identification and ticket.

Tr. 25-26, 31-32, 34. Although the officers did not expressly state that respondent was free to leave, that was

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[21] The DEA Manual stresses that agents who entertain a suspicion that they believe may be insufficient to justify an investigatory detention must not demand anything of a suspect, must not say or do anything that would foster the impression that cooperation is required, must not move anywhere with a suspect without his consent, and generally must not create the impression that the suspect is not free to leave. DEA Manual 129-131.

not essential to a finding that the encounter was consensual. *United States* v. *Mendenhall*, *supra*, 446 U.S. at 555 (opinion of Stewart, J.); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227 (1973). Because the officers at all times proceeded in a conversational manner containing no manifestation of an authoritative demand, the absence of an express disavowal of any such demand is not significant.

On this threshold issue of the existence of a Fourth Amendment seizure of the defendant's person, the burden of proof is properly placed upon the defendant.[22] In the present case, respondent has not identified, and indeed the record does not appear to contain, any evidence of behavior by the officers—let alone the use of "physical force or show of authority" that is the stated benchmark of a "seizure"—from which he could reasonably have concluded that he was not free to leave. Respondent himself testified solely to his subjective reaction to the encounter: that because he had been approached by police officers, he did not feel free to refuse to cooperate with their inquiry (Tr. 52). But whether an encounter is or is not a seizure regulated by the Fourth Amendment cannot properly turn upon the subjective beliefs or characteristics of a suspect, matters than are unknowable to the officers and therefore would result in precisely the same objective conduct having varying and unpredictable legal consequences. Indeed, this Court has consistently recognized that this kind of question is in fact governed by an objective standard. *E.g.*, *Scott* v. *United States*, *supra*, 436 U.S. at 136-137; *Terry* v. *Ohio*, *supra*, 392 U.S. at 21-22.

In so saying, we do not doubt that the socialization of many members of our society promotes in them an atti-

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[22] If, as the Court has held, "[t]he proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by [a] challenged search or seizure," *Rakas* v. *Illinois*, 439 U.S. 128, 131 n.1 (1978) (citations omitted), it necessarily follows that the proponent of suppression must show that a seizure implicating the Fourth Amendment in fact occurred.

tude of cooperation with law enforcement authorities that would render it psychologically difficult to refuse even the most politely framed police inquiry. Nor do we question that persons such as respondent, approached in the midst of commission of a serious crime, will often be prompted by feelings of guilt or anxiety to cooperate with police inquiries, even to the point of confessing or consenting to a search that they know will reveal evidence of their illegal activity. Both types of reactions are commonplace, and both are of great utility to law enforcement efforts. But so long as the impetus for cooperation springs from the individual's socialization and psychological makeup, and is not induced by behavior of the officers that demands cooperation even from those not internally disposed to it, there is no justification for bringing the restrictions of the Fourth Amendment to bear. *Schneckloth* v. *Bustamonte*, *supra*, 412 U.S. at 234 n.15; *Coolidge* v. *New Hampshire*, 403 U.S. 443, 488 (1971); see also *United States* v. *Washington*, 431 U.S. 181, 187-188 (1977); *Miranda* v. *Arizona*, 384 U.S. 436, 477-478 (1966) ("It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement.")[23]

If the presence of a Fourth Amendment seizure is to be determined with reference to the subjective motives of the individual for cooperation, or on the basis of presumptions that suspects would not voluntarily cooperate with police inquiries but would do so only in submission to an assertion of authority, the result would be to convert most police-suspect encounters into "seizures" requiring specific, articulable suspicion of criminal activity. Such a result would place a damaging and entirely unwarranted burden upon law enforcement, for it makes no allowance for the progressive accumulation

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[23] Discussing *Coolidge*, the Court in *Schneckloth* noted (412 U.S. at 234 n.15, quoting 403 U.S. at 488):

> We found nothing constitutionally suspect in the subjective forces * * * impell[ing] coopera[tion] with the police. 'Among those are the simple but often powerful convention of openness and honesty * * *.'

of evidence that in many situations represents the only means by which suspicion amounting to probable cause may be established, and criminal activity detected or prevented. Recognition of this principle lies behind the rule of *Terry* and its progeny recognizing the permissibility of limited investigative detentions on less probable cause. Similar considerations dictate that objectively noncoercive encounters between police and citizens (including those suspected of criminal activity) be allowed without demonstration of any particular level of suspicion as a predicate.[24]

B. Even If The Initial Encounter With Respondent Constituted A Fourth Amendment Seizure Of His Person, It Was Justified By Reasonable Suspicion Of Criminal Activity

As noted above, this Court has repeatedly held that police may detain a person for investigative purposes not tantamount to an arrest on the basis of reasonable suspicion that he is engaged in criminal activity that does

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[24] We note, however, that contacts made by drug enforcement agents are far from random. See pages 25-30, *infra*. Agents participating in the DEA's airport surveillance program and others receiving DEA training (see note 1, *supra*) are instructed that "[y]ou may contact a suspect only when you have *some* suspicion that he is involved in criminal activity" (DEA Manual 125) and that "[y]ou must be able to articulate *some* facts" that precipitated the contact. *Id.* at 126; emphasis in original. Although comprehensive statistics reflecting the outcome of contacts initiated by DEA agents are unavailable at this time, the restraint which governs the operation of the program is revealed by evidence in some of the cases which have arisen from it. For instance, in *United States* v. *Garcia*, 450 F. Supp. 1020, 1022 (E.D.N.Y. 1978), the defendant was the only individual contacted in a day of surveillance at New York's busy La Guardia airport. Available data concerning the outcome of searches authorized by travelers contacted substantiates the conservative approach taken by agents. In the first 18 months of surveillance at the Detroit Airport, 96 encounters involving 141 persons led to 77 discoveries of narcotics and 122 arrests. *United States* v. *Mendenhall*, *supra*, 446 U.S. at 562 (opinion of Powell, J.), citing *United States* v. *Van Lewis*, 409 F. Supp. 535, 539 (E.D. Mich. 1976), aff'd, 556 F.2d 385 (6th Cir. 1977). See also DEA Manual, 2-3.

not meet the standard of probable cause. *Michigan* v. *Summers*, *supra*, slip op. 6-9 (collecting cases). The cases establish three considerations to be weighed in determining the reasonableness of an investigative detention: "(i) the public interest served by the seizure, (ii) the nature and scope of the intrusion, and (iii) the objective facts upon which the law enforcement officer relied in light of his knowledge and expertise." *United States* v. *Mendenhall*, *supra*, 446 U.S. at 561 (opinion of Powell, J.; citations omitted).

Little need be said to establish the compelling public interest served by airport surveillance for drug couriers. As explained by Justice Powell in *Mendenhall* (446 U.S. at 561-562) there are few law enforcement activities more essential to the well-being of our society. The high priority assigned to this matter by the federal government, which was noted in *Mendenhall*, continues to this date and explains our interest in this case. A holding that requires a high level of suspicion for the kind of minimally intrusive police inquiry involved in the initial questioning of respondent and that discredits reliance upon the kinds of subtle factors that have proved reliable to trained agents in the special context of airport drug courier detection would have a grave adverse impact upon what has proven to be one of the most successful programs for interdicting this nation's illicit drug traffic.

Turning to the second factor cited in Justice Powell's opinion in *Mendenhall*, the nature and scope of the intrusion, the initial police contact in this case, if a "seizure" at all, was the mildest sort of infringement upon respondent's liberty imaginable. It involved no actual or overtly threatened physical restraint, the inquiry was made in a polite and unobtrusive conversational manner and entailed no public embarrassment, and it was of very brief duration (especially prior to the development of additional information strengthening the officers' suspicions). The parallels between the instant case and *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976), are especially instructive. Both cases involved the activities of specially trained law enforcement officers

dealing with a specific and serious law enforcement problem at a location that was a relatively focused point for the particular activity under investigation. In both cases the agents were confronted with the task of singling out from a relatively large universe of innocent travelers a small group of offenders. In *Martinez-Fuerte* the Court not only sanctioned routine interference with all motorists passing the checkpoint, but, most relevant here, permitted the officers to single out certain motorists for a stop of longer duration at a secondary inspection station on the basis of factors that concededly would not have constituted reasonable suspicion of alien smuggling activity in other contexts, justifying this result in large part on the basis of the very limited nature of the intrusion. *Id.* at 563. In this case, the intrusion is no greater than in *Martinez-Fuerte*, but the level of individualized suspicion is substantially stronger.

This brings us to the third factor in the analysis—the basis for the officers' suspicions. Whatever might be said about the substantiality of the facts observed by the officers here as a basis for justifying a more intrusive seizure in a setting different from and less specialized than the airport drug interception effort, the officers' actions in this setting were well justified. Among the facts that supported the officers' suspicion were respondent's extreme nervousness, his particular concern for his luggage, his scrutiny of others suggesting he was trying to ferret out surveillance, his use of cash from a large roll of bills to pay for his ticket, and his failure to completely fill in the required baggage labels.

The District Court of Appeal stressed its view that these traits may commonly be associated with innocent behavior (Pet. Supp. App. 39-41). That observation wholly fails to support the conclusion drawn from it; if the facts observed were consistent with criminal behavior only, they would supply probable cause. In any event, these facts are not to be regarded in isolation but in conjunction, in light of the special setting in which they arose, and through the trained eyes of an airport drug surveillance detective. *United States* v. *Cortez*, 449 U.S.

411, 418-420 (1981); *United States* v. *Mendenhall*, *supra*, 446 U.S. at 563-565 (opinion of Powell, J.); *United States* v. *Brignoni-Ponce*, *supra*, 442 U.S. at 884-885. Viewed in this manner, even conduct that might appear "wholly innocent to the untrained observer" may create an articulable basis for suspicion when viewed by a trained officer. *Brown* v. *Texas*, 443 U.S. 47, 52 n.2 (1979).

Although the evidence relied upon by the officers here is subtle, it is not to be disregarded. As the statistics cited in *Mendenhall* (446 U.S. at 562) reveal, these factors, which along with others have been compiled into an informal drug profile used in one form or another by federal agents and many state agents, have proven a powerful indication of criminal drug smuggling activity. Moreover, it is simply unrealistic to expect professional drug couriers to give themselves away in any more blatant fashion. To require police to disregard such subtle clues is to discard what may be the only effective means of combatting drug smuggling accomplished through commercial air transportation. In view of the extremely limited intrusion involved, the grounds for suspicion available to the officers here should be held a sufficient predicate for any "seizure" associated with the initial questioning of respondent.

In suggesting a contrary conclusion, the court below stated that Officer Johnson's claim that he could differentiate ordinary flight anxiety from the nervous behavior typically exhibited by a drug courier "must be completely disregarded" (Pet. Supp. App. 40 n.4). We cannot overemphasize the extent of our disagreement with the court below, which ridiculed this element of the officers' observations as "amateur forensic psychiatry" (*ibid.*). In our view, it defies common sense to suppose that officers who have spent months or years observing tens of thousands of air travelers passing through airports would not be able to distinguish between the type of nervousness manifested by persons who fear apprehension for criminal activity and that exhibited by persons who fear air travel, are worried about missing

a connecting flight, or are concerned about some other commonplace and innocent anxiety associated with air travel. In this connection, we note that most drug couriers are aware of the existence of courier detection programs at airports, so that their movement of illicit drugs through airports must be a time of extraordinarily high anxiety for them; it would be astonishing if this anxiety were not often manifested by visible symptoms of "nervousness" that, although often subtle, are nevertheless reliably detectable by a trained or experienced observer. Indeed, the findings of modern science confirm that there is an extensive "body language" consisting of non-verbal and largely unconscious communication that all of us "speak" and understand. See, *e.g.*, G. Lindzey, C. Hall & R. Thompson, *Psychology* 424-425 (2d ed. 1978); J. Fast, *Body Language* (1970); P. Farb, *Word Play* 231-247 (1973).

Thus, any rule that tells airport surveillance agents that they must disregard observations of nervousness that in their experience is typical of drug courier activity would deprive them of perhaps the single most useful and reliable factor for singling out suspicious individuals for further investigation. It would also conflict with decisions of this Court that recognize that a trained police officer is a professional observer of criminal conduct who can often see meaning where an untrained lay person would not. *United States* v. *Cortez*, *supra*, 449 U.S. at 418; *Brown* v. *Texas*, *supra*, 443 U.S. at 52 n.2; *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 885.[25]

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[25] We note that the observation of characteristic nervousness by a trained officer is not less objective simply because it is difficult to describe. It is real, visible behavior that could be recognized as indicative of possible drug courier activity by others if, for example, a film of the suspect's behavior were available. Moreover, in this particular case, contrary to the suggestion of the court below, the officers' suspicion did focus upon two objective articulable facts relating to respondent's physical expression of nervousness. First,

The conclusion we espouse is not inconsistent with *Reid* v. *Georgia*, 448 U.S. 438 (1980). The facts found insufficient there to establish reasonable suspicion were less probative of criminal conduct than those described here. As the Court indicated in Reid (*id.* at 441), the facts observed there "describe a very large category of presumably innocent travelers." That observation would not apply to the basis for the police contact here. Particularly significant, in our judgment, is the officer's recognition of furtive conduct typical of a drug courier. More importantly, the intrusion at issue in *Reid* assumed significantly greater proportions than that at issue here, for there the DEA agents stopped arriving passengers who had already left the terminal. The initial interrogation yielded no further incriminating information, yet the defendants were asked to return to the terminal and submit to a search. The greater intrusion presumed to have occurred in *Reid*[26] may also have influenced the Court's conclusion that there was insufficient suspicion to justify it.[27]

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respondent's luggage appeared to be a special object of concern. Second, respondent appeared to be unusually concerned about who might be watching him. Viewed in conjunction, these facts tend to corroborate the officers' suspicion sufficiently to justify their initial approach to respondent.

[26] The Court in *Reid* did not decide whether the contact was purely consensual. 448 U.S. at 443 (Powell, J., concurring).

[27] Assuming that the initial contact was lawful, it is plain that respondent was not unlawfully seized when he accompanied the police officers to their office. First, the trial court evidently found that the respondent voluntarily consented to accompany the agents to their office. As explained above (pages 23-24), respondent's testimony that he felt obliged to honor the officers' requests is not inconsistent with a finding of voluntary consent because there is no indication that the officers' conduct induced this feeling in respondent. Even if respondent was seized at this juncture, the seizure was lawful, for by then the officers had assuredly acquired reasonable suspicion of illegal activity based upon respondent's use of a false name and his proffering of a false story to explain the use of the alias.

CONCLUSION

The judgment of the District Court of Appeal of Florida should be reversed.

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NO. 80-2146-CSY	TITLE Florida, Petitioner v. Mark Royer

DOCKETED	COURT
June 16, 1981	District Court of Appeal of Florida, Third District

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Calvin L. Fox
	Counsel for Respondent: Theodore Klein,
May 15, 1981	Application for an extension of time to file petition for writ of certiorari and order granting same until June 16, 1981 by Powell, J, May 19, 1981
June 16, 1981	Petition for writ of certiorari filed. (Record filed)
July 20, 1981	Brief for the respondent in opposition filed.
July 22, 1981	DISTRIBUTED. SL13P3.
July 22, 1981	Supplemental appendix to petition filed. (D).
Oct. 5, 1981	REDISTRIBUTED. 10-9.
Oct. 27, 1981	REDISTRIBUTED 10-30.
Nov. 20, 1981	REDISTRIBUTED. 11-25.
Nov. 30, 1981	Petition GRANTED.

Jan. 7, 1982	Order extending time to file the joint appendix and petitioner's brief on the merits until Jan. 28, 1982.
Jan. 27, 1982	Order further extending time to file the petitioner's brief on the merits until Feb. 1, 1982.
Jan. 28, 1982	Brief, amici curiae, of Americans for Effective Law Enforcement, Inc., joined by the State of Arizona filed.
Jan. 27, 1982	Application for leave to file a brief as amicus curiae in excess of page limitations, and order denying same by Powell, J., 1/28/82.
Jan. 26, 1982	Application for leave to file petitioner's brief on the merits in excess of page limitations, and order denying same by Powell, J., 1/28/82.
Jan. 28, 1982	Application refiled with Burger, CJ., and order denying same 1/28/82.
Feb. 1, 1982	Brief for the U. S. as amicus curiae filed.
Feb. 8, 1982	Brief for the petitioner filed.
Feb. 8, 1982	Appendix to brief of petitioner filed.
Feb. 2, 1982	Joint appendix filed.
Feb. 16, 1982	Motion of Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument filed.
Feb. 24, 1982	Order extending time to file the respondent's brief on the merits until March 24, 1982.

(over)

80-2146

Title

No.

DATE	PROCEEDINGS AND ORDERS
Mar. 1, 1982	The motion of the Solicitor General for leave to participate in oral argument as amicus curiae, for divided argument and for additional time for oral argument is GRANTED and five additional minuted are allotted for that purpose. The respondent is also allotted an additional five minutes for oral argument.
Mar. 24, 1982	Brief for the respondent filed.
Aug. 5, 1982	CIRCULATED.
Oct. 6, 1982	Reply brief for the petitioner filed. (D).
Oct. 12, 1982	ARGUED.